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In the

Supreme Court of the United States

JOHN HANSL,

Petitioner,

v.

THE UNITED STATES OF AMERICA,

Respondent.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Eighth Circuit

PETITION FOR WRIT OF CERTIORARI

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QUESTIONS PRESENTED

1. Whether the language of §14(a) of the Refugee Relief Act of 1953 ("RRA"), which barred the grant of a visa to persons who "personally advocated or assisted in persecution because of race, religion, or national origin," created a *per se* bar for a former concentration camp guard, when the State Department applied immigration policy in 1955 to such applicants to mean that they must have "personally participated" in atrocities before being ineligible for a visa.

2. Whether the process established by this Court in *Fedorenko v. United States* requires that statements of consular officials who administered the RRA be considered by a court that is conducting statutory interpretation of the RRA, thereby resolving an apparent conflict in principle between the circuits on an issue of statutory interpretation.

3. Whether the Government's withholding of exculpatory evidence, later produced as an acknowledgment of error, resulted in erroneous statutory interpretation and violation of the Due Process Clause of the Fifth Amendment.

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PETITION FOR A WRIT OF CERTIORARI

OPINIONS BELOW

The opinion of the court of appeals (App. at 3a) is reported at 439 F.3d 850. The opinion of the district court (App. at 11a) is reported at 364 F. Supp. 2d 966.

JURISDICTION

The court of appeals' judgment was entered on March 7, 2006. A timely petition for rehearing was denied on May 18, 2006. (App. at 1a). The jurisdiction of this Court is invoked under 28 U.S.C. § 1254(1).

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

- The relevant provisions of the Refugee Relief Act of 1953, Pub. L. No. 203, 67 Stat. 400, as amended by 68 Stat. 1044 (1954) ("RRA") are reproduced at App. at 52a.

- The relevant provisions of the Immigration and Nationality Act of 1952, Pub. L. No. 82-414, Ch. 477, 66 Stat. 163 ("INA") are reproduced at App. at 52a-53a.

- The relevant provisions of the Displaced Persons Act of 1948, Pub. L. No. 80-774, Ch. 647, 64 Stat. 1009, as amended by Pub. L. No. 81-555, Ch. 262, 64 Stat. 219 (1950) ("DPA") are reproduced at App. at 53a.

- The Due Process Clause of the Fifth Amendment provides in relevant part: "No person shall be* * * deprived of life, liberty, or property, without due process of law * * *".

STATEMENT

This case raises important, recurring questions relating to the visa eligibility of former concentration camp guards under the Refugee Relief Act of 1953 ("RRA"), the meaning of this Court's reliance upon consular testimony in *Fedorenko v. United States*, 449 U.S. 490 (1981), and the impact of withheld exculpatory evidence upon proper statutory interpretation and issues of due process.

Following the end of World War II, Congress enacted emergency legislation creating visas for refugees in Europe, resulting in the Displaced Persons Act of 1948 ("DPA"). Four years later, Congress created what became permanent national immigration law, the Immigration and Nationality Act of 1952 (INA). One year later, in response to requests from President Eisenhower, Congress enacted new emergency refugee visa legislation, the Refugee Relief Act of 1953 ("RRA").

In *Fedorenko*, this Court interpreted the DPA as it applied to a former concentration camp guard who obtained his visa by misrepresenting material facts. The Court gave great weight to the testimony of a former vice-consul in its process of statutory interpretation. The lower courts have continued the practice of utilizing consular testimony to assist in determining how the DPA was administered when that statute was in effect.

Here, in addition to the RRA precedent of *United States v. Friedrich*, 402 F.3d 842 (8th Cir.2005), the district court relied upon DPA and INA case law to support the court's conclusion that a former concentration camp guard would have been ineligible for a visa under the RRA. Those courts utilized consular testimony in reaching their conclusions, in conformance with the procedure of *Fedorenko*. However, the district court overlooked the testimony of multiple consular

officials regarding their understanding of the eligibility of former concentration camp guards under the RRA, and the court made no mention of such testimony in its holding. Statements from consular officials indicated that State Department policy under the RRA, unlike policy under the DPA, was to grant visas to former concentration camp guards absent "personal participation" in atrocities, or other specific acts. (C.A. App. 58; 128; 1159; 1164; 1150; 1104; 1142).

Upholding the district court, the Eighth Circuit held: "We need not turn to either the immigration officials' testimony or legislative history to determine the meaning of "personally assisted" because the language of section 14(a) of the RRA is unambiguous. . . 'The plain meaning of a statute controls, if there is one, regardless of an agency's interpretation.' *Hennepin Cty. Med. Ctr. V. Shalala, 81 F.3d 743, 748 (8th Cir. 1996).*" (App. 8a).

There is a split within the circuits on the issue of how to determine congressional intent where Congress has declined to define crucial terms within immigration statutes. In the Third Circuit asylum case, *Chen v. Ashcroft,* 381 F.3d 221, 232 (3rd Cir. 2004), Justice Alito authored the opinion which held that the undefined and ambiguous term "persecution" expressed "unmistakable" congressional intent to delegate interpretive authority to the agency. That decision stands in contrast to the Eighth Circuit's ruling in the present case, which stated: "The RRA does not define 'personally assisted.' In the absence of an express definition for a term used in a statute, we interpret words as having their ordinary, common meaning. *United States v. Fountain,* 83 F.3d 946, 952 (8th Cir. 1996)." (App. 8a). This split within the circuits requires this Court's intervention, because it affects important issues of statutory interpretation within the immigration context. Furthermore, there is now a division on the issue of applicability of consular testimony as it affects

denaturalization cases. Why such testimony would be consistently viewed by courts as relevant in DPA cases in conformance with *Fedorenko*, but viewed as irrelevant in an RRA case, poses an important question for this Court's earliest possible resolution.

Factual Background.

The History of the RRA: Following the end of World War II, a flood of refugees created political and practical concerns for Europe and its allies. The Cold War created political and foreign policy considerations that changed the nature of former alliances, and the Executive Branch was concerned with Soviet agitation and the "political stability of our allies." (C.A. App. 1433). President Eisenhower requested that Congress enact emergency refugee legislation creating visas for these refugees. (C.A. App. 1433)

When the DPA was enacted shortly after WWII ended, its strict exclusionary language precluded the grant of a visa to any applicant who had "advocated or assisted in persecution" of persons because of race, religion, or national origin. (App. 53a). DPA §13 also contained a prohibition against those who were members of any movement hostile to the United States. (App. 53a). The amended DPA added visas for persons of German ethnic origin who were otherwise eligible as displaced persons but who were expressly excluded under the Constitution of the International Refugee Organization, but congressional concerns were later expressed that few of those visas were ever granted. (App. 53a); (C.A. App. 344). It is well-established that any ethnic German or other refugee who had served within the Waffen SS as a concentration camp guard would have been ineligible for a visa under the DPA and its strict "assistance-in-persecution" standard. *See generally, Fedorenko* and its progeny.

During hearings for the subsequent emergency refugee statute which became the RRA, the fact that over eight million ethnic Germans had been brutally expelled throughout Europe after WWII was decried as "one of the darkest chapters in the history of mankind." (C.A. App. 306). Ethnic German expellees received the single largest quota under the proposed new legislation. RRA§4(a)(1). (App. 52a). As noted by the Nuremburg Tribunal, as many as one-third of the Waffen SS had been conscripted by the end of the war. *Nuremburg Trial,* 6 F.R.D. 69, 141 (1946). However, whether voluntary or conscripted, the only branch of the German military that ethnic Germans could have served within was the Waffen SS. (*See Friedrich*, 402 F.3d at 842, stating that *Friedrich* attempted to join the *Wehrmacht* (German Armed Forces) but was denied entry because he was not a German citizen.) Many Waffen SS had been assigned to concentration camp guard duty, thus making them ineligible for visas under the DPA.

Congress ultimately declined to provide definitions for the terms "personally," "advocated," "assisted," or "persecution" within the RRA, and assigned responsibility for the administration of the Act to the Administrator of the Bureau of Security and Consular Affairs established in the Department of State, pursuant to §2(d) of the Act. The State Department was authorized to issue regulations under §104 of the Immigration and Nationality Act, which was incorporated within §15 of the RRA. (App. 52a).

In describing the objective of the RRA as it related to ethnic Germans, Senator Watkins, the sponsor of the Act, stated: "The purpose of the bill with respect to German expellees and escapees is to give people who did not have a chance before an opportunity now to come to the United States, and relieve the load on West Germany and Austria.

This time the bill is written so specifically that I do not see any way around it." (C.A. App. 344).

The exclusionary language as it was ultimately enacted in RRA §14(a) included the addition of the modifier "personally" to the assistance-in-persecution clause borrowed from DPA §13, but removed the "hostile membership" clause that had existed within DPA §13, which had made any applicant whose mere membership within a proscribed organization hostile to the United States ineligible for a visa. (App. 52a-53a).

Hansl's Wartime Service History: Hansl, an ethnic German, was born in 1925 in the former Yugoslavia, in what is present-day Croatia, and grew up speaking only Croatian. Germany invaded Yugoslavia in 1941. He was conscripted into the Waffen SS, and sent to serve as a guard at Sachsenhausen concentration camp, a forced labor camp. He requested a transfer to the front lines, which was denied, and he was later transferred to Natzweiler concentration camp, also a forced labor camp. His duties as a guard primarily consisted of preventing prisoners' escape, as well as other standard duties of a guard, including escort to and from work detail, tower duty, and searching for a missing prisoner. Ultimately, near the end of the war, he was transferred to a combat unit and was wounded in eastern France. He was captured, investigated by both the U.S. Army and France for possible war crimes, and released. Hansl went to a refugee camp in Austria, where he stayed for seven years. He applied for an RRA visa in 1955, which was granted on August 29, 1955. (App. 4a-6a).

Lower Court Proceedings: The parties submitted cross-motions for summary judgment, and both motions were opposed. Hansl's evidence included: An official State Department policy document dated March 2, 1954, later codified into the regulations, titled CA-4674, which clarified

the national immigration eligibility criteria for former Waffen SS under INA §212(a)(27). (C.A. App. 386-88). Under that policy, a former concentration camp guard was eligible for a visa so long as he did not "personally participate" in atrocities. The evidence further included: the sworn testimony of a former Deputy Coordinator of the Refugee Relief Program, finding Hansl eligible for his visa on the facts according to State Department Instruction CA-4674; an affidavit from a former RRA consular official which stated that in 1956, he had requested an advisory opinion from the State Department regarding the eligibility of a former concentration camp guard under the RRA, and had been advised that absent evidence of killings, the applicant was admissible; plus Government interview statements from multiple other RRA consular officials indicating that former guards could have been granted visas under the RRA. The evidence also included files of eleven other known former concentration camp guards who were granted visas under the RRA.

The court did not comment on the consular testimony, and granted summary judgment for the Government, stating, "Here, the Court finds there is nothing in the language of the RRA, or in the meaning of the word 'personally,' that is ambiguous." (App. 28a). Using dictionary definitions for the word "personally," the court determined that "a person could not receive a visa under the RRA if that person 'on or for [his] own part' advocated or assisted in persecution." (App. 29a). The court further found that: "Whether or not the Defendant's service in the Waffen SS was voluntary, however, is irrelevant to a determination of whether his visa was properly issued within the meaning of the RRA." (App. 29a). Similarly, the court found that consular officials' knowledge of Hansl's wartime service as a concentration camp guard was also irrelevant: "Even assuming, however,

that immigration and consular officials were fully aware of Defendant's status as a member of the Waffen SS, and of his duties as a Death's Head guard, the fact remains that if Defendant 'personally advocated or assisted in persecution of any person or group of persons because of race, religion, or national origin,' he had no legal right to a visa, regardless of what the issuing officials knew or did not know. This is so because the mistaken grant of a visa confers no rights upon its recipient." (App. 31a).

In addition to the numerous factual distinctions separating Hansl from *Friedrich,* Hansl pointed out that he did not argue that "subjective intent" to persecute was the statute's meaning, as *Friedrich* had. (Petitioner's Brief in Resistance to Government's Motion for Summary Judgment, 73-74). Rather, Hansl had contended that the State Department's Instruction CA-4674, and the factors applied by consular officials when assessing former concentration camp guards under the RRA, should control. Regardless, the court found that *Friedrich* controlled, and that: "Defendant here, like *Friedrich*, argues that he did not 'personally' advocate or assist in the persecution of prisoners at the concentration camps because there is no evidence that he subjectively intended to persecute others. . ." (App. 22a-23a).

Applying the statutory meaning of the DPA to an RRA defendant, the court held that: "The wealth of case law on the issue [whether Defendant personally advocated or assisted in the persecution of any person or group of persons because of their race, religion, or national origin] under both the Holtzman Amendment and the DPA, as well as the Eighth Circuit Court of Appeals ruling in *Friedrich*, decided under the RRA, compel this Court to conclude that he did." (App. 33a).

Appellate Proceedings:

Hansl appealed to the Eighth Circuit, arguing that the district court's ruling misstated the law, did not reflect the defendant's theory, and was unsupported by the evidence.

Following the submission of briefs and prior to oral arguments, the Government came forward with four documents that had previously been produced in heavily redacted form during discovery in response to Hansl's request for information relating to applicants who were rejected under the RRA, and one new document. One of the documents, produced in its unredacted form, showed that CA-4674 had been applied to RRA-era applicants. (App. 51a). All of the applicants had been assessed for the commission of atrocities. The withheld evidence also showed that the standard applied to a former concentration camp guard in 1954 was that such an applicant was eligible for a visa so long as he had not "personally participated" in atrocities. (Applicant P.S.) (App. 51a).

Hansl submitted a Motion to Supplement the Record which was uncontested by the Government, thereby acknowledging its error in withholding the information in the proceedings below. (App. 38a). At oral arguments on February 14, 2006, Hansl urged the panel to consider the issue of the withheld evidence relating to standards of "personal participation" in atrocities.

Hansl contended that he was distinguishable from *Friedrich* (and RRA defendant *Kumpf,* who participated in a massacre) on important factual grounds. *United States v. Kumpf,* 438 F.3d 785, 2006 WL 408051 (7th Cir.2006). *Friedrich* volunteered for service, had participated in death marches, and had misrepresented the facts of his wartime service when he applied for a visa. Hansl was conscripted, the facts of his service had been known to consular officials,

and he had not participated in atrocities. (Petitioner's Appellate Opening Brief, 34). Regardless, the court below held that: "We agree with the district court that the facts in *Friedrich* are nearly identical to the facts in this case and that *Friedrich* is controlling here." (App. 9a). The court submitted its ruling on February 14th, 2006, the same day oral arguments were held, and filed it on March 7, 2006, thereby summarily affirming the district court's ruling granting summary judgment in favor of the Government.

In Hansl's petition for rehearing en banc, it was brought to the Eighth Circuit's attention that the Third Circuit has addressed the important issue of statutory interpretation in an asylum case. Justice Alito authored the opinion, finding that the undefined term "persecution" expressed a congressional intent to delegate: "We infer from Congress's use of this ambiguous term an intent to delegate interpretive authority to the agency, including the ability to decide, within a reasonable range, the contours of its meaning." *Chen v. Ashcroft*, 381 F.3d 221, 232 (3rd Cir. 2004). The significance of the withheld evidence as showing that the State Department definitely applied CA-4674 to a former concentration camp guard in 1954 (who was almost certainly applying for a visa under the RRA) was also clarified. However, the Eighth Circuit did not mention either *Chen v. Ashcroft* or the withheld evidence in its summary denial of the petition on May 18, 2006, stating in a footnote only that "Judge Colloton did not participate in the consideration or decision of this matter." (App. 1a). The fact that Judge Colloton was not on the original panel would appear to indicate that there was sufficient concern among the ranks of the other members of the Eighth Circuit regarding the correctness of the panel's decision to have brought the matter to a vote.

REASONS FOR GRANTING THE PETITION

I. The Importance of the Issues Involved Require This Court's Early Resolution.

a. The Decision Below Conflicted With the State Department's Construction of Correct Policy.

Under *Chevron*, with regard to judicial review of an agency's construction of the statute which it administers, if Congress has not directly spoken to the precise question at issue, the question for the court is whether the agency's answer is based on a permissible construction of the statute. *Chevron, U.S.A., Inc., v. Natural Resources Defense Council, Inc.*, 467 U.S. 837, 841-843 (1984). Here, the first question is whether Congress has spoken directly to the issue of whether or not a former concentration camp guard was eligible for a visa under the RRA. By virtue of the fact that Congress delegated administration of the Act to the agency and failed to define the specific terms within §14(a), it must be said that Congress left a gap for the agency to fill with its own interpretation of what conduct met the criteria for an applicant who had "personally assisted in persecution." *See Chen v. Ashcroft* at 232 (finding *Chevron* applicable when Congress failed to define the term "persecution" within an immigration statute).

The decision below stands in direct conflict with the policy of the State Department regarding former Waffen SS, including concentration camp guards, as it administered the RRA and the Immigration and Nationality Act (INA). That policy was articulated within CA-4674, a State Department Instruction issued under INA §212(a)(27) on March 2, 1954, and later codified within 22 C.F.R. 42.42 (a)(28). (C.A. App. 2054). State Department policy as articulated under CA-4674 clarified that former Waffen SS, including members of an "organization or organizations which perpetrated

atrocities," were not ineligible for a visa unless the applicant had "personally participated" therein. (C.A. App. 386-88). In using the word "personally," the State Department harmonized the broad national immigration law of the INA and the RRA, a three-year emergency refugee visa statute enacted within the framework of the INA, as noted by Walter Bedell Smith, Acting Secretary of State during discussion of the proposed legislation which resulted in the RRA: "This proposal is not directed toward changing [the Immigration and Nationality Act]. In fact the program it provides for would operate within the framework of the general existing legislation." (C.A. App. 752). RRA §15 incorporated the INA, thereby making its provisions applicable to all RRA applicants. (App. 52a). Therefore, it follows that policy directives issued under the INA applied without exception to RRA applicants.

CA-4674 and INA §212(a)(27) were therefore logically applied to RRA applicants, as became evident when the Government belatedly produced the unredacted versions of the documents that were the subject of the Motion to Supplement the Record. Those documents related to previously-requested files of applicants who had been rejected under the RRA.[1] (*See,* Motion to Supplement the Record, Applicant P.S., rejected on 3/16/54 on the basis of INA §212(a)(27): "cites case in Circular Instruction CA-4674 dated 3/2/54. States unless consular official believes subject participated in atrocities, mere membership in Totenkopf SS and duty at Dachau is not enough to exclude him under (a)(27) (unless general unrest would result from admission). (App. 51a). *See also,* Applicant G.K., rejected in 1955 under

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[1] It should be noted that one applicant, G.G., could not possibly have been an RRA applicant, because the date of his rejection was 1961, five years after the end of the life of the statute.

RRA §14(a) and INA §212(a)(27): "Report revealed Subject was a member of the SS and had a long history of cruelty. Also an informant in the Gestapo. Participated in suppression of Warsaw uprising. State should stand by its Section (a)(27) refusal – it appears that he is not refused only because of his SS membership under (a)(27)." (App. 46a). *See also*, Applicant A. A., rejected in 4/55 under RRA §14(a) and INA §§212(a)(27) and 212(a)(19): "Applicant found to have been mayor...obtained post by arresting Polish administration who were shot – was chief investigator of action against Polish intelligencia, 70 shot, took [bribes] for never [giving] help to Jews." (App. 42a).

These examples of rejected applicants demonstrate that during the administration of the RRA, consular officials applied INA §212(a)(27) in rejecting applicants found to have been active persecutors. Even when RRA §14(a) could have been sufficiently applied on its own, INA §212(a)(27) was co-applied in the reasons for rejection of RRA applicants. It is thus demonstrated that the State Department considered RRA applicants to fall squarely within the jurisdiction of the INA. The logical rationale, of course, is that the State Department was striving for coherent and consistent application of national immigration policy as legislated by Congress.

The State Department's application of INA §212(a)(27) and CA-4674 to RRA applicants, as indicated by the previously withheld evidence, means that the agency's interpretation of the RRA must be understood within the context of this State Department policy, promulgated under the authority Congress gave it within INA §104 to issue regulations which also applied to RRA applicants. As such, it may be said that the State Department understood §14(a) to mean that a former concentration camp guard was not ineligible for a visa unless he had "personally participated" in atrocities. (App. 51a).

With the production of the formerly-withheld evidence, the reality of how the State Department actually dealt with former concentration camp guards under national immigration laws in place during 1955, including the RRA, is now not in question. The knowing grant of visas to such applicants were not *ultra vires* acts, as argued by the Government and accepted by the lower courts, but acts done in full compliance with State Department policy at that time. Former consular officials have also made statements that verify this policy.

Dr. James Klemstine, a vice consul in Germany during the RRA, was interviewed by the OSI's current director, Eli Rosenbaum, in 1981. Dr. Klemstine told OSI Director Rosenbaum that he had requested an advisory opinion from the State Department in 1956 on whether a former concentration camp guard was eligible for a visa. The State Department responded that unless there was evidence that the applicant had participated in killings, the applicant was *not* ineligible for a visa under the RRA. (Klemstine Affidavit.) (C.A. App. 128).

This consular testimony is the same type of evidence relied upon by this Court in *Fedorenko*. This credible testimony firmly establishes that the State Department interpreted the RRA as not excluding former concentration camp guards, so long as they had not participated in atrocities. Furthermore, other consular officials have made similar statements:

- "He was not happy with the way former Nazi/SS personnel were handled under the RRA. He remembered cases where he had granted visas to perimeter guards who had served at the KL camps (although later in the interview, he stated that he could be wrong)." (R.B. Interview.) (C.A. App. 1104).

- "W. felt that under Section 14 the word 'personally' required that a refugee could not be refused a visa unless an investigation revealed that the refugee committed a specific atrocity or brutality." (O.W. Interview.) (C.A. App. 1164).

- "He probably would have issued a visa to an alien who, while being a non-commissioned officer or private in the SS, served as a Nazi concentration camp guard." R.K. Interview. (C.A. App. 1150).

- "If someone was drafted to be a guard, J. thinks they could still receive a visa, if they proved they had been drafted." (B.J. Interview.) (C.A. App. 1142).

- "In guidance to RRA visa officers [State Department and Visa Office officials] Mssrs. L'Heureux and Smith noted that CA-4674 removed the rigidity that numbers of consular officials had perceived in Section 212(a)(27), (28), and (29) of the Immigration and Nationality Act and, by extension, Section 14 of the Refugee Relief Act. . . No longer could RRA visa officers automatically find a person ineligible to receive a visa solely because of membership in a proscribed organization." (Blake Affidavit.) (C.A. App. 58).

- "There were guidelines excluding only those who had themselves been involved in particular acts. These guidelines were 'legalistic' in setting forth the elements required for refusal." (E.L. Interview.) (C.A. App. 1159).

These examples demonstrate that a former concentration camp guard was not *per se* ineligible for a visa under the RRA. The statements further indicate that it was official policy under the RRA to apply the ultimate threshold of exclusion under §14(a) as participation in acts of atrocities or brutality, in consonance with CA-4674. Some consular

officials were candid in their expressions of distaste for the State Department's policy. Regardless, the policy was official, and cannot be nullified by judicial override of congressional and executive responsibility over foreign policy, as this Court has repeatedly observed: "[W]e have recognized that judicial deference to the Executive Branch is especially appropriate in the immigration context, where officials exercise especially sensitive political functions that implicate questions of foreign relations." *INS v. Aguirre-Aguirre,* 526 U.S. 415, 424 (1999), *quoting INS v. Abudu,* 485 U.S. 94, 110 (1988).

b. RRA Cases Are Equivalent to Death Penalty Cases.

RRA defendants are elderly and most likely in poor health.[2] In Hansl's case, recent hospitalizations due to congestive heart failure and diabetic wounds reflect his increasing frailty.[3] In the event of a successful deportation action and subsequent deportation to Croatia, Hansl would likely die almost immediately because of health conditions

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[2] *See*, Robert Gillette, Soviet Aide Warned U.S. on War Crime Evidence, Los Angeles Times, April 28, 1986 ("Other attorneys have complained that OSI continues prosecuting two other suspected war criminals even though they were hospitalized with terminal cancer and closed the cases only on receipt of death certificates and photographs of the bodies.").

[3] Medical note from physician dated 6/14/06 states: "Please note patient hospitalized 6/10/06 to 6/14/06 with multiple medical problems to include cellulitis/joint infection/possible osteomyelitis (L) index DIP joint with tophaceus gout, acute renal failure, chronic renal insufficiency, pancytopenia with anemia requiring blood transfusion (myelodysplasia) and Aranesp therapy, diabetes mellitus, atrial fibrillation requiring anticoagulation and minimal monthly laboratory monitoring. He will need multiple physician follow-up and 4-6 weeks of intravenous antibiotic therapy and wound care."

that require constant monitoring. Hansl is likely to be representative of the class of defendants under the RRA who, while having perpetrated no immigration fraud and having participated in no atrocities while concentration camp guards, could find themselves in countries with poor health care options and no money left for that care after lengthy and stressful litigation.

Issues of basic justice demand that naturalized citizens such as Hansl be held to the standards that the State Department applied at the time the visa was granted as an exercise of properly delegated authority, not contemporary standards courts devise. "The responsibilities for assessing the wisdom of such policy choices and resolving the struggle between competing views of the public interest are not judicial ones: 'Our Constitution vests such responsibilities in the political branches.'" *Chevron* at 866. The consequences of such judicial nullification rise to the level of capital punishment for many of these elderly defendants, and constitute fundamental injustice.

II. The Decision Below Reflects Uncertainty Over the Meaning of *Fedorenko v. United States* and the Procedures for Statutory Interpretation Outlined By This Court.

a. *Fedorenko* Mandated Consideration of Consular Officials' Testimony When A Court Undertakes Statutory Interpretation of an Immigration Statute.

Under the standard of *Fedorenko v. United States,* 449 U.S. 490 (1981), the testimony of credible consular officials is to be given consideration by a court when determining congressional intent for an immigration statute enacted in the distant past. *Fedorenko v. United States,* 449 U.S. 490, 515, n.35 (1981). In rejecting the District Court's application of the law to the facts, this Court stated:

> "The District Court refused to give conclusive weight to [vice-consul] Jenkins' testimony . . . However, Jenkins' testimony was in accordance with the plain language of the statute." *Id.*

This Court's method of determining congressional intent relied heavily upon the consular witness's interpretation of the Act, which "was 'uniformly' accepted by the vice-consuls, and furthermore, he knew of no case in which a known concentration camp guard was found eligible for a DPA visa." *Fedorenko* at 499.

Here, in sharp contrast to policy under the DPA, the statements of seven consular officials who participated in the administration of the RRA, discussed *supra*, indicated that a former concentration camp guard would *not* have been *per se* ineligible for a visa under that Act, absent participation in atrocities or acts of brutality. The State Department applied the language of the RRA as excluding only those former concentration camp guards who had, in the language of CA-4674, "personally participated" in atrocities. (Motion to Supplement the Record, Applicant P.S.) (App. 51a). This reasonable interpretation must be accepted, according to *Fedorenko* and *Chevron*, and supported by *Chen*, especially when considered in light of the fact that the father of the RRA, Senator Watkins, favored flexibility over "strict, rigid rules," following a discussion of a refugee who had served at three concentration camps. (C.A. App. 781.1-2).

The Court left the door open to revisit these issues by stating that *Fedorenko's* profile of conduct "fits within the statutory language about persons who assisted in persecution of civilians. Other cases may present more difficult line-drawing problems. . . " *Fedorenko* at 512, n.34. Now, with different statutory language and thus a different standard to apply, it is appropriate for this Court to clarify the "personally-assisted-in-persecution" standard as applied under

the RRA. "Personally participated in atrocities" was the "personally-assisted-in-persecution" standard as applied by the State Department from 1954 on. (App. 51a); (*See also*, C.A. App. 58, 1159, 1142, 1150, 1104, 1164, 128) (describing the criteria applied to former concentration camp guards by consular officials).

b. The Decision Below Violated Standard Practices of Administrative Law, in Violation of *Fedorenko*.

This Court has stated:

> "We hold that administrative implementation of a particular statutory provision qualifies for *Chevron* deference when it appears that Congress delegated authority to the agency generally to make rules carrying the force of law, and that the agency interpretation claiming deference was promulgated in the exercise of that authority."

U.S. v. Mead, 533 U.S. 218, 226 (2001). Conversely, this Court has stated: "We have never applied [deference] to agency litigating positions that are wholly unsupported by regulations, rulings, or administrative practice." *Bowen v. Georgetown Univ. Hosp.*, 488 U.S. 204, 212 (1988). Here, the deference being requested of the Court is for a position that is supported by congressional delegation, regulation, and administrative practice embodied in the examples of as many as thirty-two known former concentration camp guards who were granted visas under the RRA.

Here, the Government maintained, and the lower courts accepted, that all of the visas knowingly issued to former concentration camp guards, ultimately numbering as many as thirty-two, were merely the *ultra vires* acts of rogue officials who were acting beyond the scope of their office. Aside from the great number of misinformed and incapable consular officials such an explanation requires, to the great disservice

of our foreign service professionals, that explanation fails to account for the high-level policy directive signed by Acting Secretary of State Walter Bedell Smith in March of 1954, which clarified the position taken by the State Department regarding the eligibility for visas of former Waffen SS, even those members of an "organization or organizations which perpetrated atrocities." Such applicants were admissible, unless they had "personally participated" therein. (C.A. App. 387).

As the withheld evidence confirms, State Department Instruction CA-4674 was applied to former concentration camp guards in 1954. (Applicant P.S., Motion to Supplement the Record) (App. 51a). It was therefore not merely the acts of a few rogue vice-consuls to grant visas to former concentration camp guards during the tenure of the RRA, but official State Department policy, as authorized by Congress. The fact that the Government withheld the exculpatory evidence underscores its significance, and the careful consideration it should have been given by the lower court.

III. The Circuits Are Divided Over Issues Regarding Congressional Intent to Delegate Interpretive Authority to the Agency.

a. This Case of First Impression Presents the Conflict.

In *Chen v. Ashcroft,* an asylum case, Justice Alito authored the opinion of the Third Circuit, stating that an undefined term such as "persecution," also found within the "personally-assisted-in-persecution" clause of the RRA, indicated an "unmistakable" intent on the part of Congress to delegate interpretive authority to the agency. *Chen v. Ashcroft*, 381 F.3d 221, 232 (3d Cir. 2004), *citing Chevron, U.S.A., Inc., v. Natural Resources Defense Council, Inc.*, 467 U.S. 837 (1984). Justice Alito's application of *Chevron* within the asylum context logically applies to the RRA, as

well. "We infer from Congress's use of this ambiguous term an intent to delegate interpretive authority to the agency, including the ability to decide, within a reasonable range, the precise contours of its meaning." (*Id.*)

The exclusionary clause of the RRA, §14(a), states: "No visa shall be issued under this Act to any person who personally advocated or assisted in the persecution of any person or group of persons because of race, religion, or national origin." (App. 52a). None of the terms in that clause were defined by the 83rd Congress, which chose to delegate administration of the Act to the Administrator of the Bureau of Security and Consular Affairs. RRA §2(d). (App. 52a).

The Eighth Circuit's decision appears to conflict, whether directly or in principle, with the above authority by affirming a statutory interpretation that ignored evidence of agency practice when interpreting an immigration statute. The Eighth Circuit held: "We need not turn to either the immigration officials' testimony or legislative history to determine the meaning of "personally assisted" because the language of section 14(a) of the RRA is unambiguous. . . The RRA does not define 'personally assisted.' In the absence of an express definition for a term used in a statute, we interpret words as having their ordinary, common meaning." (App. 8a). The lower court's ruling also conflicted with the interpretation applied by the State Department in 1955, which found former concentration camp guards eligible for visas so long as they had not personally participated in atrocities: "As in *Friedrich,* it is not necessary for Hansl to have fired a weapon, harmed a prisoner, or killed a prisoner or enemy for Hansl's actions to constitute giving personal assistance." (App. 9a). (*cf.*, Motion to Supplement the Record, Applicant P.S., State Department advisory opinion applied language of CA-4674 to a former concentration camp guard). (App. 51a).

The present case is a case of first impression because this Court has yet to review an RRA case, and this is the first case in which an RRA defendant had no involvement in atrocities. The first case brought under RRA §14(a) charges was *Friedrich*, who, during his voluntary Waffen SS service, participated in death marches.[4] *United States v. Friedrich,* 402 F.3d 842, 844 (8th Cir.2005). *Kumpf* participated in a massacre. *United States v. Kumpf,* 438 F.3d 785, 2006 WL 408051 (7th Cir.2006). Applying the standards of the recently-produced documents, such participation in atrocities would have made those applicants ineligible for visas under the RRA. The present case is the first RRA case in which a court has had the opportunity to clarify the correct "personally-assisted-in-persecution" standard, because both the evidence necessary to properly interpret the statute, as well as an atrocity-free defendant, are presented in this case.

b. The Issues Presented by the Conflict Will Be Recurring and Are of Great Moral Importance.

At the pretrial conference of April 9, 2004, Government counsel indicated that fifteen to twenty RRA cases are pending. (Pretrial Conference Transcript, p. 18.) Thus, not only are up to twenty more defendants potentially affected by incorrect statutory interpretation, but this number also affects the weight to be given the number of known former guards knowingly admitted.

The Government refused to turn over files of former guards who had not yet been charged, and therefore, those files could not be included in Hansl's arguments relating to known former guards who were admitted, although they should have been. The Government argued below, relying

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[4] Friedrich would not have been eligible for an RRA visa regardless, due to misrepresentation of his wartime service.

upon *Abourezk v. Reagan*, 785 F.2d 1043 (D.C. Cir. 1986) that "three visa denials, and four examples from the State Department manual were 'inadequate to enable a court to determine reliably the nature of general administrative practice,'" when it knew all along that in reality, the real number of known admitted guards was at least between twenty-seven to thirty-two. (Government's Brief in Opposition to Defendant's Motion for Summary Judgment, 37). As the State Department applied it from 1954 on, participation in atrocities was the ultimate threshold of exclusion for a former concentration camp guard under the RRA. (*See,* Motion to Supplement the Record, Applicant P.S.) (App. 51a). For those defendants such as Hansl who did not participate in atrocities and committed no immigration fraud, justice and public policy considerations require resolution by this Court and proper application of the principles of statutory interpretation mandated by *Fedorenko, Chevron, and Chen.*

Because as many as twenty other defendants are potentially affected by erroneous interpretation of the RRA's "personally-assisted-in-persecution" standard, with potential deportation as the ultimate consequence, this is an urgent issue for this Court's earliest resolution.

IV. The Decision Below Is Incorrect.

a. The Court Below Erred By Overlooking Due Process Violations.

"Procedural due process imposes constraints on governmental decisions which deprive individuals of 'liberty' or 'property' interests within the meaning of the Due Process Clause of the Fifth or Fourteenth Amendment." *Matthews v. Eldridge*, 424 U.S. 319, 332 (1976). "The fundamental requirement of due process is the opportunity to be heard 'at a meaningful time and in a meaningful manner.' *Id.* at 333.

Relevant precedent in denaturalization begins with *Schneiderman v. United States*, 320 U.S. 118, 125 (1943), and *Chaunt v. United States*, 3644 U.S. 350, 353 (1960), which held that the government could only revoke a citizen's naturalization based on "clear, unequivocal, and convincing" evidence that he had obtained citizenship illegally.

During discovery, Hansl had requested information relating to rejected RRA applicants. The Government produced summaries of applicants, heavily redacted and not sufficiently probative to be useful. Following submission of appellate briefs and shortly before oral argument, the Government came forward with five documents in their unredacted form. Within the documents was highly relevant, exculpatory evidence relating to CA-4674 and its application to RRA-era concentration camp guards.

When the Government withheld highly relevant, exculpatory evidence that had been initially requested during discovery, producing it in such highly-redacted form so as to be meaningless, the Government violated Hansl's due process right to a fundamentally fair hearing. Had the evidence been produced in its unadulterated form, and allowed to be presented to the district court with thorough and complete argument, it should have made a difference in the outcome of the case. That court would have known that it was national immigration policy of the United States in 1955 to issue visas to former concentration camp guards, under both the INA and RRA, absent "personal participation in atrocities." (*See*, Motion to Supplement the Record, Applicant P.S., *citing* CA-4674.)

Hansl had argued that CA-4674 had been a highly relevant policy document during the period in question. (Hansl Brief In Support of Motion for Summary Judgment, 38). The unredacted information proved that was the case. The Government's arguments calling CA-4674 "irrelevant,"

coupled with the redaction of the exculpatory evidence, unfairly shaded and misdirected the court's focus. (Government Brief In Opposition, 26). Furthermore, the redactions were a clear *Brady* violation. (*See, Demjanjuk v. Petrovsky*, 10 F.3d. 338, 354 (6th Cir. 1993). (Failure to disclose information is a due process violation and applies within the denaturalization setting, where the consequences equal or exceed those of most criminal convictions, *citing Brady v. Maryland*, 373 U.S. 83 (1983).)

The original visa files (that the summarized documents written by a Government attorney were based upon) are now unlocatable. This raises further questions relating to the Government's failure to safeguard the original exculpatory documents.

b. The Court Below Erred in Failing to Properly Apply *Chevron* Principles Within the Immigration Context.

In reviewing questions of immigration law, it is well-established that this Court gives deference to executive agency interpretations. *INS v. Aguirre-Aguirre,* 526 U.S. 415, 424 (1999). "[W]e have recognized that judicial deference to the Executive Branch is especially appropriate in the immigration context, where officials exercise especially sensitive political functions that implicate questions of foreign relations." *Id., quoting INS v. Abudu,* 485 U.S. 94, 110 (1988); and at 424, *citing Chevron U.S.A. v. Natural Resources Defense Council, Inc.* 467 U.S. 837, 842 (1984). When Congress has not "directly spoken to the precise question at issue," a court must sustain the agency's approach so long as it is "based on a permissible construction of the statute." *Chevron U.S.A. Inc. v. Natural Resources Defense Council, Inc.*, 467 U.S. 837, 842-843, 104 S.Ct. 2778, 2781-2782, 81 L.Ed.2d 694 (1984). "A precondition to deference under *Chevron* is a congressional delegation of administrative authority." *Adams*

Fruit Co. v. Barrett, 494 U.S. 638, 649 (1990). Congress assigned administration of the RRA to the Administrator of the Bureau of Consular Affairs within the Department of State, in RRA §2(d), thereby satisfying that condition. Since Congress declined to define with any specificity the types of persecution it wanted covered within the RRA's definitions, leaving the key terms of §14(a) undefined, that gap must be then filled by the agency's interpretation.

In the present case, the statements of seven consular officials have made it clear that while a former concentration camp guard would have been ineligible for a visa under the DPA, that was not so under the RRA.[5] The significant changes Congress made to the statutory exclusionary language that ultimately became the RRA's §14(a), when compared to DPA §13's exclusionary language, resulted in the State Department making correspondingly appropriate changes in the application of the statute within the field. Before a former concentration camp guard was found ineligible under the RRA, he must have "personally participated" in atrocities as the ultimate threshold for exclusion, from March of 1954 on. (*See,* P.S., Motion to Supplement the Record.) (App. 51a).

The withheld evidence went toward showing that the State Department applied CA-4674 and its statutory basis, INA §212(a)(27), to RRA-era applicants and former concentration camp guards.[6] (Motion to Supplement the Record, Applicant

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[5] At deposition, Mr. Blake, who had also served as both a vice-consul and Deputy Coordinator of the Refugee Program under the DPA, stated that he had no question that a former concentration camp guard would not have been eligible for a visa under the DPA. (C.A. App. 445).

[6] The documents were summaries written by OSI government attorneys, and the original files have disappeared. Where otherwise the period of time and the profile of the applicant indicate an RRA applicant, it must be presumed that the applicants were RRA applicants, where the attorney

P.S.) (App. 51a). The State Department's interpretation that a former concentration camp guard must have personally participated in atrocities before being ineligible for a visa in violation of §14(a)'s exclusion of applicants who had "personally advocated or assisted in persecution" was a reasonable interpretation of the statute, and as such, must be respected under *Chevron*. 467 U.S. 837, 842-843. The lower court erred by failing to apply *Chevron* standards in the present case, where State Department policy should have been the controlling factor in interpreting §14(a). That failure resulted in manifest injustice for the defendant and all similarly-situated defendants.

c. The Court Below Erred In Holding That the RRA's Language Excluded Former Waffen SS Concentration Camp Guards.

In understanding the original intent of the 83rd Congress when it enacted the RRA, it is true that "[the] starting point in interpreting a statute is always the language of the statute itself." *United States v. S.A.*, 129 F.3d 995, 998 (8th Cir. 1997). Here, Congress chose to make ethnic German expellees, many of whom could have served in the Waffen SS, the top priority of the RRA. This choice expressed clear congressional intent, especially in light of the fact that many ethnic Germans would have been barred from the grant of visas under the DPA if their military service had included concentration camp guard service.

Congress also chose to modify the "assistance-in-persecution" clause as it had existed within the DPA by adding the modifier "personally," and removing the membership clause. (App. 52a-53a). Those choices

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neglected to note the application history, and simply noted the date and basis for the rejection.

regarding the language further expressed congressional intent to achieve different results under the RRA than had been achieved under the DPA. Notably, Congress declined to define the crucial terms within the exclusionary provisions of §14(a), simply assigning the administration to the Administrator of the Bureau of Consular Affairs. (RRA §2(d)) (App. 52a).

"When the language of a specific provision, taken together with its history and other aids of construction, do not provide unequivocal answers to the question of congressional intent, a court may look to the overall structure and purpose of the statute to determine which of the possible readings seems to fit in best with the goal that Congress had in mind." (Court's "'duty is to find that interpretation which can most fairly be said to be imbedded in the statute, in the sense of being most harmonious with its scheme and with the general purposes that Congress manifested'"). *Doe v. DiGenova*, 779 F.2d 74, 83 (C.A.D.C., 1985) (quoting *NLRB v. Lion Oil Co.*, 352 U.S. 282, 297 (1957). Had the language not been modified, many ethnic Germans would again have been excluded under the RRA, as they had previously been under the DPA.

Evidence of the precise legislative process leading to the addition of the term "personally" to S. 1917's ambiguous personally- assisted-in-persecution clause does not exist. The original proposal to add the word "personally" came from lobbyist James Finucane during the prior session with the intent to create "amnesty" for ethnic Germans, and to exclude only those who had "personally carried out the crimes of intolerance." (C.A. App. 23). In any case, it is necessary to consider the overarching objectives of the statute to put the modifications to the exclusionary provisions into proper perspective.

Since ethnic German expellees received the single largest quota under the RRA, it is clear that Congress intended something to be different from ethnic Germans' experience under the DPA, which failed to issue sufficient visas to ethnic Germans, according to Senator Langer. (C.A. App. 344). In describing the objective of the RRA as it related to ethnic Germans, Senator Watkins responded: "The purpose of the bill with respect to German expellees and escapees is to give people who did not have a chance before an opportunity now to come to the United States, and relieve the load on West Germany and Austria. This time the bill is written so specifically that I do not see any way around it." (C.A. App. 344). This unequivocal statement of congressional intent with regard to ethnic Germans, coming from the leading sponsor of the Act, must be given due effect. While the statute's language ultimately proved to be confusing,[7] the statute's delegation to the Administrator of Consular Affairs within the State Department meant that the agency responsible for administering the statute could interpret and apply the language reasonably such that the Act's overall objectives could be accomplished.

The DPA and the RRA had different exclusionary standards. Within the asylum context, this Court has stated: "How 'meaningful' the differences between the two standards may be is a question that cannot be fully decided in the abstract, but the fact that Congress has prescribed two different standards in the same Act certainly implies that it

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[7] Administrator Scott McLeod quoted a letter to Congress from the supervising Consul General of Italy: "You and your associate expressed views and brought information which was positive and to the point and which helped enormously to dispel some doubts and perplexities which had arisen as to the meaning of certain of the vague language found in the RRA Act and regulations." (App. 1244).

intended them to have significantly different meanings." *INS. v. Cardoza-Fonseca,* 480 U.S. 421, 447,n.31 (1987).

Here, Congress did not prescribe two different standards within the same statute, but rather, within two similar refugee statutes. However, the rationale is analogous. Congress used different language, and therefore, it must be understood that "Congress intended the two standards to differ." *Id.* To apply them as identical in meaning is to do violence to the original intent of Congress. By interpreting the RRA's "personally-assisted-in-persecution" clause to mean the same thing as the DPA's "assisted-in-persecution" clause, making mere membership in concentration camp service ranks sufficient grounds for exclusion, the lower court's ruling effectively wrote the changes out of the statute.

This Court should grant the petition and reverse the decision below to ensure that RRA statutory interpretation is applied correctly and to preserve the fundamental right to due process when the Government seeks to strip the liberty and citizenship interests of a naturalized citizen.

CONCLUSION

The petition for a writ of certiorari should be granted.

Respectfully submitted,

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APPENDIX A

UNITED STATES COURT OF APPEALS FOR THE EIGHTH CIRCUIT

No. 05-2540

[Filed May 18, 2006]

United States of America,	)
	)
Appellee,	)
	)
vs.	)
	)
John Hansl,	)
	)
Appellant.	)
	)

Order Denying Petition for Rehearing and for Rehearing En Banc

The petition for rehearing en banc is denied. The petition for rehearing by the panel is also denied.

Judge Colloton did not participate in the consideration or decision of this matter.

Order Entered at the Direction of the Court:

/s/

Clerk,
U.S. Court of Appeals, Eighth Circuit

APPENDIX B

UNITED STATES COURT OF APPEALS FOR THE EIGHTH CIRCUIT

No. 05-2540

[March 7, 2006]

United States of America,	)
	)
Plaintiff - Appellee,	)
	)
v.	)
	)
John Hansl,	)
	)
Defendant - Appellant.	)
	)

Appeal from the United States District Court for the Southern District of Iowa

Before RILEY, MELLOY, and BENTON, Circuit Judges.

OPINION

MELLOY, Circuit Judge.

John Hansl ("Hansl"), a former SS concentration camp guard, appeals the district court's[1] order revoking his citizenship pursuant to 8 U.S.C. § 1451(a). We affirm.

I.

After extensive discovery, the parties filed cross motions for summary judgment. The district court denied Hansl's motion and granted the government's motion. A number of facts concerning Hansl's wartime service and immigration application are in dispute. We base our decision on the following facts, which are set forth in a light most favorable to Hansl, the party against whom summary judgment was granted.

Hansl was born on January 21, 1925, in Donji Miholjac, Yugoslavia, in what is present-day Croatia. Hansl's family was ethnic German several generations removed, but he grew up speaking Croatian.

Germany invaded Yugoslavia in 1941. In February 1943, the Waffen SS came to Hansl's hometown and ordered one male from each ethnic German family to serve the Nazi cause. Since Hansl's father had small children to support, the Germans conscripted Hansl into the Waffen SS.

Hansl was assigned to the first company of the SS Death's Head Guard Battalion at Sachsenhausen concentration camp near Berlin, Germany. He was given an SS tattoo. Hansl's main duty was to prevent prisoners from escaping from the concentration camp. Accordingly, his duties included

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[1] The Honorable Robert W. Pratt, United States District Judge for the Southern District of Iowa.

guarding prisoners from watch towers, marching prisoners at gunpoint to and from sites near the main camp where prisoners performed forced labor, and guarding prisoners while they performed forced labor. In these capacities, Hansl gave orders to the prisoners. When Hansl served as a guard in a watch tower, he was armed with a machine gun. When he escorted prisoners to and from labor sites, and while at the sites, Hansl was armed with a rifle. Hansl had strict orders to shoot any prisoner who tried to escape from the concentration camp. Hansl warned prisoners that these were his orders. On at least one occasion, Hansl assisted in the search for a missing prisoner. When the prisoner was found, he was shot to death, although Hansl did not fire the shot.

Hansl requested a transfer to the front lines, but that request was denied. Hansl served at Sachsenhausen until on or about October 29, 1943. At that time, approximately 150 guards, including Hansl, were transferred out of Sachsenhausen. Hansl was transferred to a supply depot in Lublin, Poland. He served there until March 1944, when he was transferred to the Natzweiler-Struthof concentration camp in Natzweiler, France. His duties at Natzweiler were nearly identical to his duties at Sachsenhausen. Hansl also assisted in guarding prisoners on one train transport between camps while at Natzweiler.

In September 1944, Hansl was transferred to a combat unit. In November 1944 he was wounded in eastern France. He remained in various German military hospitals until January 1945, when he was transferred to Augsburg, Germany. In May 1945 Hansl was captured by the United States Army. He was detained and investigated for possible war crimes. At that time, he disclosed the foregoing wartime service history. In February 1947, he was transferred to the custody of French authorities. Hansl was released from a

prisoner of war facility in November 1947. From there he went to an Austrian refugee camp.

Hansl applied for a United States visa in August 1955. On his application, Hansl listed as his wartime residence the "German Army." Hansl claims he told immigration officials that he had been a concentration camp guard. On August 29, 1955, United States State Department Vice Consul Richard Bloomfield issued Hansl a visa. The visa was approved by INS Officer Lester Greener, an INS inspector stationed in Salzburg, Austria. Hansl entered the United States at the port of New York on November 5, 1955. He was naturalized by the United States District Court for the Southern District of Iowa on October 30, 1961.

The government brought a single charge of illegal procurement to revoke Hansl's citizenship on July 23, 2003, pursuant to 8 U.S.C. § 1451(a). The basis for the government's action was the Refugee Relief Act of 1953 (the "RRA"). Pub. L. 83-203, 67 Stat. 400 (1953), amended by Pub. L. No. 83-751, 68 Stat. 1044 (1954). On appeal, Mr. Hansl argues that the district court erred in failing to correctly interpret and apply the RRA.

II.

We review de novo the district court's grant of summary judgment. *Bear Robe v. Parker*, 270 F.3d 1192, 1194 (8th Cir. 2001). "Summary judgment is proper if the evidence, viewed in the light most favorable to the nonmoving party, demonstrates that no genuine issue of material fact exists and the moving party is entitled to judgment as a matter of law." *Id.* at 1195; Fed. R. Civ. P. 56(c).

In a denaturalization proceeding, the government has a heavy burden of proof and must provide "clear, unequivocal, and convincing" evidence to justify the revocation. *Schneiderman v. United States*, 320 U.S. 118, 125, 63 S. Ct. 1333, 87 L. Ed. 1796 (1943) (internal quotations omitted). A revocation is justified if naturalization was illegally procured. *Fedorenko v. United States*, 449 U.S. 490, 506, 101 S. Ct. 737, 66 L. Ed. 2d 686 (1981). Naturalization was illegally procured if an individual entered the country and obtained residence without a valid immigration visa. *Id.* at 518 (holding that where an alien was ineligible for a visa as a matter of law, his citizenship was "illegally procured" and subject to revocation).

After World War II, the United States admitted European refugees "without regard to regular immigration quotas, under the Displaced Persons Act (DPA)." *United States v. Friedrich*, 402 F.3d 842, 844 (8th Cir. 2005); Pub. L. No. 80-774, 62 Stat. 1009 (1948). People who "'assisted the enemy in persecuting civil[ians]' were ineligible for visas under the [DPA]." *Fedorenko*, 449 U.S. at 510 (quoting the DPA, § 2(b), 62 Stat. 1009) (first alteration in original). In 1953, Congress passed the RRA. Section 14(a) of the RRA states that "No visa shall be issued under this Act to any person who personally advocated or assisted in the persecution of any person or group of persons because of race, religion, or national origin." Pub. L. 83-203 at § 14(a), 67 Stat. at 406 (1953), amended by Pub. L. No. 83-751, 68 Stat. 1044 (1954).

The question in this appeal is whether the district court properly concluded that Hansl's admitted conduct constituted personal assistance in persecution, thereby making him ineligible for a visa under section 14(a) of the RRA. Hansl contends that the district court committed reversible error

because it did not consider or give deference to immigration officials' testimony as to what the RRA means by "personally assisted." For example, Hansl contends that the district court erred by not considering the testimony of Mr. Melville Blake, a former Deputy Coordinator for the Refugee Relief Program in 1956 and Deputy Coordinator under the DPA. Blake testified in his affidavit that State Department policies would have made Hansl admissible under the RRA. Additionally, Hansl argues that the district court failed to consider the legislative history regarding the meaning of "personal assistance" under the RRA. We find these arguments unpersuasive.

We need not turn to either the immigration officials' testimony or legislative history to determine the meaning of "personally assisted" because the language of section 14(a) of the RRA is unambiguous. "Our starting point in interpreting a statute is always the language of the statute itself." *United States v. S.A.*, 129 F.3d 995, 998 (8th Cir. 1997). "The plain meaning of a statute controls, if there is one, regardless of an agency's interpretation." *Hennepin County Med. Ctr. v. Shalala*, 81 F.3d 743, 748 (8th Cir. 1996). The RRA does not define "personally assisted." In the absence of an express definition for a term used in a statute, we interpret words as having their ordinary, common meaning. *United States v. Fountain*, 83 F.3d 946, 952 (8th Cir. 1996).

We have previously held that conduct similar to that admitted by Hansl constitutes personal assistance in persecution. *Friedrich*, 402 F.3d at 846 ("By guarding the perimeters of . . . [three] concentration camps to ensure that prisoners did not escape from these unspeakable conditions, Friedrich personally assisted in the persecution that occurred in those camps, within the meaning of the RRA."); *see also Negele v. Ashcroft*, 368 F.3d 981, 983 (8th Cir. 2004)

(holding that serving as "an armed ghetto and concentration camp guard for the SS Death's Head Battalion [constitutes assisting] in Nazi persecution" for purposes of the Holtzman Amendment, 8 U.S.C. § 1182(a)(3)(E)(i)); *United States v. Kumpf*, --- F.3d ---, 438 F.3d 785, 2006 U.S. App. LEXIS 4302, 2006 WL 408051 (7th Cir. 2006) (stating that service as a Death's Head Battalion Guard at Sachsenhausen constituted personal assistance). We agree with the district court that the facts in *Friedrich* are nearly identical to the facts in this case and that *Friedrich* is controlling here. As in *Friedrich*, it is not necessary for Hansl to have fired a weapon, harmed a prisoner, or killed a prisoner or enemy for Hansl's actions to constitute giving personal assistance. *Kumpf*, 2006 U.S. App. LEXIS 4302, 2006 WL 408051 at *4 (stating that the "lack of affirmative acts . . . does not undermine the fact that he fulfilled his role as a guard. . . . [H]e presided over and witnessed the torture and murder of helpless people. . . . [His] personal presence as an armed guard clearly assisted in the persecution of the prisoners."). Hansl's admitted conduct as a member of the Death's Head Battalion, guarding the perimeters of concentration camps while armed, issuing orders, and threatening to shoot anyone who attempted to leave a concentration camp is more than sufficient to meet the common definition of personally assisting in the persecution of a group of persons based on their race, religion, or national origin.

Finally, Hansl contends that the district court erred by failing to consider that Hansl's service was involuntary. He argues that such involuntary service makes this case distinguishable from *Friedrich*. It is irrelevant for purposes of our analysis whether Hansl joined the SS voluntarily. The district court correctly stated that "[t]he plain language of RRA section 14(a) does not contain a voluntariness requirement." Absent the express use of the word

"voluntary," we must conclude that the statute meant to include all those who assist in persecution. *Fedorenko*, 449 U.S. at 512 ("The plain language of the [DPA] mandates precisely the literal interpretation [that] an individual's service as a concentration camp armed guard -- whether voluntary or involuntary -- [makes the applicant] ineligible for a visa."). The fact that *Fedorenko* arose under the Displaced Persons Act and not the Refuge Relief Act does not change the principle that we presume that Congress would have expressly included a voluntariness requirement if it wanted to. Therefore, the fact that Hansl was conscripted into the Waffen SS does not affect our analysis.

III.

Hansl's service in the Waffen SS as an armed guard at Schasenhausen and Natzweiler concentration camps constituted personal assistance in the persecution that occurred in those concentration camps within the meaning of the RRA. Because Hansl's actions constituted personal assistance in persecution, he was ineligible for a visa under the RRA and the issuance of his visa was improper. Accordingly, he was not lawfully admitted to the United States, and his subsequent naturalization was illegally procured.

We affirm the judgment of the district court.

APPENDIX C

UNITED STATES DISTRICT COURT
FOR THE SOUTHERN DISTRICT OF IOWA
CENTRAL DIVISION

No. 4:03-cv-90406

[Filed April 8, 2005]

UNITED STATES OF AMERICA,	)
	)
Plaintiff,	)
	)
v.	)
	)
JOHN HANSL,	)
	)
Defendant.	)
	)

JUDGES: ROBERT W. PRATT, U.S. DISTRICT JUDGE.

MEMORANDUM OPINION AND ORDER

Before the Court are cross motions for summary judgment. The Government filed its motion for summary judgment on January 31, 2005 (Clerk's No. 82). Defendant John Hansl filed his motion for summary judgment on the same date (Clerk's No. 85). Each party filed a resistance to the other's motion. Likewise, both parties have filed reply

briefs. A hearing was held on the motions on March 23, 2005. The matter is fully submitted.

I. BACKGROUND

On July 24, 2003, the Government filed this action seeking to revoke the United States citizenship and certificate of naturalization of Defendant John Hansl pursuant to section 340(a) of the Immigration and Nationality Act of 1952, as amended ("INA"). 8 U.S.C. § 1451(a). The Government claims that Defendant illegally procured United States citizenship, in that he was legally ineligible to receive a visa to enter the United States under the Refugee Relief Act of 1953, Pub. L. No. 203, 67 Stat. 400, as amended, 68 Stat. 1044 (1954) ("RRA").

The following facts, pleaded in the Government's Statement of Material Facts, are undisputed. The Plaintiff in this matter is the United States of America. Defendant is a natural person. This Court properly has jurisdiction of this matter pursuant to 28 U.S.C. §§ 1331, 1335, and section 340(a) of the Immigration and Nationality Act of 1952, 8 U.S.C. § 1451(a). Venue is proper in the Southern District of Iowa pursuant to section 340(a), which provides that an action to revoke citizenship shall be brought in the judicial district in which the naturalized citizen resides at the time the suit is brought. At the time the present action was filed, Defendant was a resident of Des Moines, Iowa.

Defendant was born on January 21, 1925, in Donji Miholjac, Yugoslavia, which is located in present day Croatia. On February 22, 1943, at the age of eighteen, the Defendant, known at the time by the name "Johann Hansl" entered the Nazi Waffen SS (Armed SS), receiving the rank of SS Schutze (private). Defendant was assigned to the 1st

Company of the SS Death's Head Guard Battalion (*Totenkopf-Wachbataillon*) at Sachsenhausen Concentration Camp (also known as "Oranienburg Concentration Camp") near Berlin, Germany, where he received an SS blood type tattoo.

Sachsenhausen Concentration Camp was a place of persecution. Thousands of persons were imprisoned and murdered at the camp because of, amongst other things, their race, religion, or national origin. Sachsenhausen contained work facilities, where prisoners were forced to perform various types of labor. The complex housed a crematorium, a gas chamber, a shooting pit used for executions by firing squad, and a gallows. Starvation and disease were rampant among the prisoner population at Sachsenhausen, due to inadequate food and unsanitary conditions. Thousands of prisoners, who wore only light-weight striped uniforms year round, died, while others, deemed too ill or too weak to work, were killed or transferred to other camps to be killed. Many Sachsenhausen prisoners were murdered by shooting, hanging, gassing, beatings, and other means. The camp was also the site of a variety of gruesome medical experiments that resulted in the deaths of many prisoners. In all, tens of thousands of men, women and children died in the Sachsenhausen system while it was in operation.

All Nazi concentration camps, including Sachsenhausen, were guarded by SS Death's Head guards. These guards could request transfer to other duty. Defendant served as an armed guard of prisoners at Sachsenhausen Concentration Camp until on or about October 29, 1943. His duties included guarding prisoners from a watch tower, escorting prisoners on marches to and from sites near the main camp where the prisoners performed forced labor, and guarding prisoners while they performed forced labor outside the camp. These duties were performed on a rotating basis and were the

standard duties that perimeter guards, such as the Defendant, were ordered to perform. On at least one occasion, the Defendant assisted, in the search for a missing prisoner. When the prisoner was found, he was shot to death, though the parties agree that Defendant did not personally shoot the prisoner.

While on duty, Defendant's purpose was to prevent prisoners from escaping. While performing watch tower duties, Defendant was armed with a machine gun. While escorting prisoners to forced labor sites and guarding them as they worked, Defendant was armed with a rifle. He marched alongside the prisoners and gave them orders. Defendant was under strict orders to shoot any prisoners who attempted to escape. As a member of the SS Death's Head Guard Battalion at Sachsenhausen, Defendant wore a uniform, was paid, and was allowed to leave the camp to travel to nearby Berlin when not on duty.

On or about October 29, 1943, approximately 150 Death's Head guards, including the Defendant, were transferred out of Sachsenhausen Concentration Camp. Records reflect that from November 1943 to March 1944, the Defendant served with an SS unit in or near Lublin, Poland. In March 1944, Defendant was transferred to the SS Death's Head Guard Battalion at Natzweiler Concentration Camp, near the town of Natzweiler, in Nazi-occupied France. Like Sachsenhausen, Natzweiler was a place of persecution where thousands of persons were imprisoned and murdered because of their race, religion, or national origin. Natzweiler housed a gas chamber, a crematorium, and was the site of a variety of gruesome medical experiments. The conditions at Natzweiler were like those at Sachsenhausen, with starvation and disease rampant among the prisoner population. Many Natzweiler prisoners

were murdered by shooting, hanging, gassing, beatings, or other means.

Defendant's duties at Natzweiler were nearly identical to his duties at Sachsenhausen. Until October 1944, Defendant served as an armed guard of prisoners. Armed with a machine gun, he guarded prisoners from a watch tower. Armed with a rifle, he escorted prisoners to forced labor sites and guarded them while they worked. Defendant's purpose as an SS Death's Head guard at Natzweiler was to prevent prisoners from escaping. Indeed, while guarding forced labor details, the Defendant told prisoners that if they attempted to escape, he would shoot them. On at least one occasion, Defendant guarded prisoners on a train transport from Natzweiler to another concentration camp. Like at Sachsenhausen, the Defendant was under strict orders to shoot any prisoner who attempted to escape. While stationed at Natzweiler, the Defendant was allowed to leave the camp and travel to a nearby village when not on duty.

In September 1944, Defendant was transferred to a combat unit, the 17th SS Reconnaissance Battalion, a component of the 17th SS Armored Infantry Division "Gotz von Berlichingen." On approximately November 30,1944, the Defendant was wounded in combat near Sarreguemines in eastern France. He remained in various German military hospitals until January 1945, when he was transferred to a healing station in Augsburg, Germany. In May 1945, Defendant was captured by the United States Third Army in Augsburg and was held as a prisoner-of-war. In February 1947, he was transferred to the custody of French authorities. He was eventually released from custody in November 1947.

In August 1955, Defendant applied for an immigration visa under the RRA at the United States Consulate in

Salzburg, Austria. On his visa application, Defendant's name, date of birth, and place of birth were correctly listed. His wartime residence was listed from 1943 to 1945 as the "German Army."[1] On August 29, 1955, United States State Department Vice Consul Richard Bloomfield issued Defendant a visa. The visa was also approved by Lester Greener, an Immigration and Naturalization Service Inspector stationed in Salzburg. Defendant entered the United States at the Port of New York, as a non-quota immigrant under the RRA, on November 9, 1955. He was naturalized by the United States District Court for the Southern District of Iowa on October 30, 1961, and received Certificate of Naturalization No. 8366435.

II. STANDARD FOR SUMMARY JUDGMENT

Summary judgment has a special place in civil litigation. The device "has proven its usefulness as a means of avoiding full-dress trials in unwinnable cases, thereby freeing courts to utilize scarce judicial resources in more beneficial ways." *Mesnick v. General Elec Co.*, 950 F.2d 816, 822 (1st Cir. 1991). In operation, the role of summary judgment is to pierce the boilerplate of the pleadings and assay the parties' proof in order to determine whether trial is actually required. *See id.; see also Garside v. Osco Drug, Inc.*, 895 F.2d 46, 50 (1st Cir. 1990).

"Summary judgment is an extreme remedy, and one which is not to be granted unless the movant has established his right to a judgment with such clarity as to leave no room

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[1] Defendant notes that he did not personally list his wartime residence as the "German Army." Rather, it was typed for him, as was standard practice at consular posts.

for controversy and that the other party is not entitled to recover under any discernible circumstances." *Robert Johnson Grain Co. v. Chemical Interchange Co.*, 541 F.2d 207, 209 (8th Cir. 1976) (citing *Windsor v. Bethesda Gen. Hosp.*, 523 F.2d 891, 893 n.5 (8th Cir. 1975)). The purpose of the rule is not "'to cut litigants off from their right of trial by jury if they really have issues to try,'" *Poller v. Columbia Broad. Sys., Inc.*, 368 U.S. 464, 467, 82 S. Ct. 486, 7 L. Ed. 2d 458 (1962) (quoting *Sartor v. Arkansas Natural Gas Corp.*, 321 U.S. 620, 64 S. Ct. 724, 627, 88 L. Ed. 967 (1944)), but to avoid "useless, expensive and time-consuming trials where there is actually no genuine, factual issue remaining to be tried." *Anderson v. Viking Pump Div., Houdaille Indus., Inc.*, 545 F.2d 1127, 1129 (8th Cir. 1976) (citing *Lyons v. Board of Educ.*, 523 F.2d 340, 347 (8th Cir. 1975)).

The plain language of Federal Rule of Civil Procedure 56(c) mandates the entry of summary judgment, after adequate time for discovery and upon motion, against a party who fails to make a showing sufficient to establish the existence of an element essential to that party's case, and on which that party will bear the burden of proof at trial. *See Celotex Corp. v. Catrett*, 477 U.S. 317, 322, 106 S. Ct. 2548, 91 L. Ed. 2d 265 (1986). The precise standard for granting summary judgment is well-established and oft-repeated: summary judgment is properly granted when the record, viewed in the light most favorable to the nonmoving party and giving that party the benefit of all reasonable inferences, shows that there is no genuine issue of material fact, and the moving party is entitled to judgment as a matter of law. *See* Fed. R. Civ. P. 56(c); *Harlston v. McDonnell Douglas Corp.*, 37 F.3d 379, 382 (8th Cir. 1994). The court does not weigh the evidence nor make credibility determinations, rather the court only determines whether there

are any disputed issues and, if so, whether those issues are both genuine and material. *See Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242, 252, 106 S. Ct. 2505, 91 L. Ed. 2d 202 (1986); *Wilson v. Myers*, 823 F.2d 253, 256 (8th Cir. 1987) ("Summary judgment is not designed to weed out dubious claims, but to eliminate those claims with no basis in material fact."). It is the unusual case where the party shouldering the burden of proof prevails on a summary judgment motion. *See Turner v. Ferguson*, 149 F.3d 821, 824 (8th Cir. 1998) ("Summary judgments in favor of parties who have the burden of proof are rare, and rightly so.").

The moving party bears the initial burden of demonstrating the absence of a genuine issue of material fact based on the pleadings, depositions, answers to interrogatories, admissions on file, and affidavits, if any. *See Celotex*, 477 U.S. at 323; *Anderson*, 477 U.S. at 248. Once the moving party has carried its burden, the nonmoving party must go beyond the pleadings and, by affidavits or by the depositions, answers to interrogatories, and admissions on file, designate specific facts showing that there is genuine issue for trial. *See* Fed. R. Civ. P. 5(c), (e); *Celotex Corp.*, 477 U.S. at 322-23; *Anderson*, 477 U.S. at 257. "The mere existence of *some* alleged factual dispute between the parties will not defeat a motion for summary judgment; the requirement is that there be no *genuine* issue of *material* fact." *Anderson*, 477 U.S. at 247-48 (emphasis in original). An issue is "genuine," if the evidence is sufficient to persuade a reasonable jury to return a verdict for the nonmoving party. *See id.* at 248. "As to materiality, the substantive law will identify which facts are material . . . . Factual disputes that are irrelevant or unnecessary will not be counted." *Id.*

III. LAW AND ANALYSIS

While denaturalization is undoubtedly a civil proceeding, the Government "'carries a heavy burden of proof in a proceeding to divest a naturalized citizen of his citizenship.'" *See Fedorenko v. United States,* 449 U.S. 490, 505, 101 S. Ct. 737, 66 L. Ed. 2d 686 (1981) (quoting *Costello v. United States,* 365 U.S. 265, 269, 81 S. Ct. 534, 5 L. Ed. 2d 551 (1961)). Thus, "the evidence justifying revocation of citizenship must be 'clear, unequivocal, and convincing' and not leave 'the issue in doubt'. Any less exacting standard would be inconsistent with the importance of the right that is at stake in a denaturalization proceeding." *Fedorenko,* 449 U.S. at 505 (quoting *Schneiderman v. United States,* 320 U.S. 118, 125, 63 S. Ct. 1333, 87 L. Ed. 1796 (1943) (some internal quotations and citations omitted)). The Supreme Court has recognized that the burden of proof in denaturalization proceedings is largely identical to the proof beyond a reasonable doubt standard required in criminal proceedings. *See Klapprott v. United States,* 335 U.S. 601, 612, 69 S. Ct. 384, 93 L. Ed. 266 (1949) ("Furthermore, because of the grave consequences incident to denaturalization proceedings we have held that a burden rests on the Government to prove its charges in such cases by clear, unequivocal and convincing evidence which does not leave the issue in doubt. This burden is substantially identical with that required in criminal cases – proof beyond a reasonable doubt.").

While the Government must meet a high threshold to prevail on summary judgment, the task is not insurmountable. For while it must present clear, unequivocal, and convincing evidence, the fact remains that a certificate of citizenship is not immune from challenge. This is because the certificate is "an instrument granting political privileges, and open like

other public grants to be revoked if and when it shall be found to have been unlawfully or fraudulently procured." *Johannessen v. United States*, 225 U.S. 227, 238, 32 S. Ct. 613, 56 L. Ed. 1066 (1912). As the Court in *Fedorenko* observed:

> Our cases have also recognized that there must be strict compliance with all the congressionally imposed prerequisites to the acquisition of citizenship. Failure to comply with any of these conditions renders the certificate of citizenship "illegally procured," and naturalization that is unlawfully procured can be set aside. As we explained in one of these prior decisions: "An alien who seeks political rights as a member of this Nation can rightfully obtain them only upon terms and conditions specified by Congress . . . . No alien has the slightest right to naturalization unless all statutory requirements are complied with; and every certificate of citizenship must be treated as granted upon condition that the government may challenge it . . . and demand its cancellation unless issued in accordance with such requirements." This judicial insistence on strict compliance with the statutory conditions precedent to naturalization is simply an acknowledgment of the fact that Congress alone has the constitutional authority to prescribe rules for naturalization, and the courts' task is to assure compliance with the particular prerequisites to the acquisition of United States citizenship by naturalization legislated to safeguard the integrity of this "priceless treasure."

Fedorenko, 449 U.S. at 506 (citations omitted).

Title 8 U.S.C. § 1451(a) provides that United States Attorneys have a duty to institute proceedings for denaturalization when the "order and certificate of naturalization were illegally procured or were procured by concealment of a material fact or by willful misrepresentation . . . ." In the sole count of the Complaint, the Government asserts that Defendant illegally procured his United States citizenship in that he was unlawfully admitted to the United States under the RRA. Section 14(a) of the RRA provides: "No visa shall be issued under this Act to any person who personally advocated or assisted in the persecution of any person or group of persons because of race, religion, or national origin." The Government argues that Defendant was legally ineligible to receive a visa to enter the United States because of his personal conduct while serving in the Death's Head Guard Battalion.

One of the requirements for naturalization is "lawful admission" for permanent residence. 8 U.S.C. § 1427. If the Government is correct in its assertion that Defendant's admission to the United States was unlawful within the meaning of the RRA, then Defendant's visa was invalid and he was, in turn, not admitted lawfully to the United States for permanent residence. *See* 8 U.S.C. § 1181(a)(1) ("No immigrant shall be admitted into the United States unless at the time of application for admission he ... has a *valid* unexpired immigrant visa.") (emphasis added); *see also United States v. Negele,* 222 F.3d 443, 447 (8th Cir. 2000) (holding defendant was ineligible to receive an immigration visa under the Displaced Persons Act and, therefore, failed to gain lawful admission to the country because he entered the country with an invalid visa). "Because an individual may not be naturalized unless he has first been lawfully admitted for permanent residence," citizenship founded on an invalid visa

amounts to illegal procurement. *Negele,* 222 F.3d at 447 (citing 8 U.S.C. §§ 1427 (a)(1), 1451(a)).

At the time hearing was held on the present matter, there existed only one case dealing directly with denaturalization founded upon entry under the RRA. *See United States v. Friedrich,* 305 F. Supp. 2d 1101 (E.D. Mo. 2004). The facts of *Friedrich* are identical in many ways to those now before the Court. Friedrich, an ethnic German born in Romania, joined the Waffen SS in October 1942. *Id.* at 1103. After completing basic training, Friedrich was assigned to the Death's Head unit at the Gross-Rosen concentration camp, and later was assigned to the Dyhenfurth concentration camp. *Id.* Friedrich's duties as a Death's Head guard, like Defendant, were to guard the perimeter of the camp, escort work-details to forced labor sites and guard the prisoners while they worked, and to escort prisoners from one concentration camp to another. *Id.* Friedrich was under orders to shoot any prisoners who attempted to escape. *Id.* After Allied troops overtook the German forces, Friedrich lived in Austria for several years, and eventually applied for a visa to the United States. *Id.* His visa application stated that he was in the German Army from 1942 to 1945, but made no mention of his Waffen SS service or of his duties as a concentration camp guard. *Id.* Friedrich was granted a visa under the RRA, entered the United States, and was eventually naturalized on May 4, 1962. *Id.*

As in the present case, the dominant issue in *Friedrich* was whether Friedrich's service in the Death's Head unit rendered him ineligible for the visa he received under the RRA. *Id.* Friedrich argued that ineligibility for admission under the RRA turned on whether an individual "personally" engaged in acts of persecution. *Id.* Defendant here, like Friedrich, argues that he did not "personally" advocate or

assist in the persecution of the prisoners at the concentration camps because there is no evidence that he subjectively intended to persecute others, nor is there any evidence that "any particular behavior on the part of John Hansl rose to the level of 'personally advocating or assisting in persecution.'" Def.'s Br. In Support of Mot. For Summ. J. at 14.

In *Friedrich,* Chief Judge Carol E. Jackson rejected the arguments raised and found that the plain and ordinary language of the RRA offered no support for the proposition that "by adding the word 'personally' to the RRA, Congress intended to require a showing of [an individual's] subjective intent to persecute or that he engaged in acts causing specific harm to individuals." *Friedrich,* 305 F. Supp. 2d at 1107. Chief Judge Jackson concluded: "Friedrich's service, even in the absence of any evidence that he personally committed atrocities against these individuals, qualifies as 'advocating or assisting in persecution.'" *Id.* (citing *United States v. Szehinskyj,* 277 F.3d 331, 339 (3d Cir. 2002)). Moreover, the court rejected the argument that deference must be given to the eligibility decision of the vice consul who issued the visa in the first instance. *Id.* "'The plain meaning of a statute controls, if there is one, regardless of an agency's interpretation.'" *Id.* (quoting *Hennepin County Med. Ctr. v. Shalala,* 81 F.3d 743, 748 (8th Cir. 1996)).

In the present case, Defendant offers extensive argument that the Court should reject the reasoning of *Friedrich* because, while Friedrich entered the United States under the RRA, Defendant claims the *Friedrich* Court based its decision on cases involving the INA and the Displaced Persons Act of 1948, 62 Stat. 1009 (1948) (the "DPA"). Likewise, Defendant argues that case law from courts across the country granting summary judgment on denaturalization involving concentration camp guards should be rejected because those

cases hinged either on the DPA, which preceded the RRA or on the Holtzman Amendment, 8 U.S.C. § 1182(a)(3)(E), which came after the RRA. *See e.g., Negele,* 222 F.3d at 447-48 (service in Waffen SS Death's Head guard unit, at Sachsenhausen concentration camp and Theresienstadt internment camp, was membership and participation in movement hostile to United States within meaning of DPA); *Tittjung v. Reno,* 199 F.3d 393, 398 (7th Cir. 1999) (concluding service as an armed SS Death's Head Battalion concentration camp guard constituted assisting in persecution within the meaning of the Holtzman Amendment); *Hammer v. INS,* 195 F.3d 836, 843 (6th Cir. 1999) (upholding a removal order against a former SS Death's Head Battalion guard under the Holtzman Amendment); *Kalejs v. INS,* 10 F.3d 441, 444 (7th Cir. 1993) ("The Holtzman Amendment's non-criminal provision thus makes assistance in persecution an independent basis for deportation, and assistance may be inferred from the general nature of the person's role in the war"); *Kairys v. INS,* 981 F.2d 937, 943 (7th Cir. 1992) (stating that as effective aiders and abettors of the Nazi conspiracy, armed concentration camp guards are subject to deportation under the Holtzman Amendment); *United States v. Schmidt,* 923 F.2d 1253, 1257 (7th Cir. 1991) (affirming order of denaturalization in case of armed guard in concentration camp and finding that such service was sufficient to establish that the guard "assisted in persecution" within the meaning of the DPA); *United States v. Wasylyk,* 162 F. Supp. 2d 86, 93-94 (N.D.N.Y. 2001) (holding that armed guard of concentration camp assisted the enemy in the persecution of civilians and was, therefore, ineligible for a visa under the DPA, regardless of whether he personally injured or killed anyone); *United States v. Hutyrczyk,* 803 F. Supp. 1001, 1009-10 (D.N.J 1992) (summary judgment proper because concentration camp guard assisted in the persecution of the camp's Jewish inmates within the meaning

of the DPA); *United States v. Leprich*, 666 F. Supp. 967, 968-69 (E.D. Mich. 1987) (holding immigrant was ineligible for visa he received under DPA because he had been a concentration camp guard and because he misrepresented his wartime service by failing to disclose his guard duty in his visa application, requiring revocation of his naturalization).

Shortly following this Court's hearing on the parties' motions for summary judgment, the Eighth Circuit Court of Appeals affirmed Chief Judge Jackson's ruling in *Friedrich*. *See United States v. Friedrich*, 402 F.3d 842, 2005 U.S. App. LEXIS 5129, No. 04-1728, 2005 WL 729464 (8th Cir. Mar. 31, 2005). The Eighth Circuit rejected Friedrich's contention that "in light of the need to impart some meaning to the word 'personally,'" the RRA should be interpreted to require that an applicant must have had a subjective mental intent to engage in persecution. 2005 U.S. App. LEXIS 5129, [WL] at *2 ("We agree with the district court that nothing in the ordinary meaning of the word 'personally' suggests that it connotes 'having a subjective mental intent about it.'"). Moreover, the Court accepted as true Friedrich's contention that he "never saw a prisoner escape, never harmed a prisoner, never discharged his weapon while guarding prisoners, and never saw any prisoners die during the forced evacuation marches." 2005 U.S. App. LEXIS 5129, [WL] at *3. Nonetheless, based on Friedrich's admitted service as a Death's Head guard at Nazi concentration camps, the fact that he was armed during his duties, and the fact that he had strict orders to shoot prisoners attempting to escape, the Court held:

> By guarding the perimeters of the Gross-Rosen, Dyhenfurth, and Flossenburg concentration camps to ensure that prisoners did not escape from these unspeakable conditions, Friedrich personally assisted in the persecution that occurred in those camps, within

> the meaning of the RRA. Because Friedrich's actions rendered him ineligible for a visa under the RRA, the issuance of his visa in 1955 was void *ab initio*. Accordingly, he was not lawfully admitted for permanent residence, and his subsequent naturalization was illegally procured.

Id. Moreover, in addressing the argument that deference should be accorded the decision to grant Friedrich a visa, the Court found that no deference should be granted in light of the Court's conclusion that "Congress intended the RRA to prohibit the State Department from granting a visa to an armed Death's Head concentration camp guard." 2005 U.S. App. LEXIS 5129, [WL] at *4, n.5.

In a letter from Defendant's counsel, dated April 6, 2005, Defendant attempts to distinguish the facts and the ruling in the *Friedrich* case from the present one. First, Defendant argues that the *Friedrich* district court was not presented with any evidence of legislative history regarding the development and passage of the RRA. "Therefore, when the 8th Circuit stated in a footnote that 'we have concluded that Congress intended the RRA to prohibit the State Department from granting a visa to an armed Death's Head concentration camp guard,' it was because that Court, unlike this Court, had to rely on only the legislative history of the Holtzman Amendment passed in 1978, which has absolutely nothing to do with the RRA's original legislative history or intent." Def.'s Letter at 1.

In briefing the present motion for summary judgment, Defendant cites extensively to the legislative history of the RRA. Defendant suggests that, to determine the meaning of the word "personally" in the RRA, the Court must review the committee hearings and look to hearing debates to discern

what Congress actually intended to convey by the use of the word. Unfortunately, Defendant's reliance solely on legislative history is contrary to the well-established rules of statutory construction, *i.e.*, that courts must assume, "absent sufficient indication to the contrary, that Congress intends the words in its enactments to carry 'their ordinary, contemporary, common meaning.'" *Pioneer Inv. Serv. Co. v. Brunswick Assoc. Ltd. P'ship,* 507 U.S. 380, 388, 113 S. Ct. 1489, 123 L. Ed. 2d 74 (1993) (citation omitted); *see also United States v. Ron Pair Enter., Inc.,* 489 U.S. 235, 241, 109 S. Ct. 1026, 103 L. Ed. 2d 290 (1989) (stating that when the statute's language is plain the sole function of the court is to enforce it according to its terms).

"The 'strong presumption' that the plain language of the statute expresses congressional intent is rebutted only in 'rare and exceptional circumstances,' when a contrary legislative intent is clearly expressed." *Ardestani v. I.N.S.,* 502 U.S. 129, 135, 112 S. Ct. 515, 116 L. Ed. 2d 496 (1991) (quoting *Rubin v. United States,* 449 U.S. 424, 430, 101 S. Ct. 698, 66 L. Ed. 2d 633 (1981)); *Neosho R-V Sch. Dist. v. Clark,* 315 F.3d 1022, 1032 (8th Cir. 2003) ("Statutory construction must begin with the language employed by Congress and the assumption that the ordinary meaning of that language accurately expresses the legislative purpose."). Thus, where a statute is clear, courts should look to the legislative history only if Congress expressed a legislative intention contrary to the plain language of the statute. *See Consumer Prod. Safety Comm'n v. GTE Sylvania, Inc.,* 447 U.S. 102, 108, 100 S. Ct. 2051, 64 L. Ed. 2d 766 (1980). In this case, the plain language of the RRA provides, "No visa shall be issued . . . to *any person who personally advocated or assisted in the persecution* of any person or group of persons because of race, religion, or national origin." RRA Section 14(a) (emphasis added). As noted by Chief Judge Jackson:

"'Personal,' as defined by Black's Law Dictionary, (5th ed. 1979), means 'Appertaining to the person; belonging to an individual . . . .'" *Friedrich,* 305 F. Supp. 2d at 1106. Webster's Dictionary defines the term as: "so as to be personal; in a personal manner; often; as oneself; on or for one's own part." Webster's Third New International Dictionary (1961). "An 'ambiguity exists when a statute is capable of being understood by reasonably well-informed persons in two or more different senses.'" *In re Erickson P'ship,* 856 F.2d 1068, 1070 (8th Cir. 1988) (quoting *Allen v. Geneva Steel Co.,* 281 F.3d 1173, 1178 (10th Cir. 2002) (additional citations omitted)). Here, the Court finds there is nothing in the language of the RRA, or in the meaning of the word "personally," that is ambiguous. There is no ambiguity in the statute itself, no inconsistency between the language of section 14(a) and other language in the statute, and a plain language reading does not create an irrational result. *See id.* "Unless exceptional circumstances dictate otherwise, when we find the terms of a statute unambiguous, judicial inquiry is complete." *Neosho,* 315 F.3d at 1032-33 ("Absent some ambiguity in the statute, [the court has] no occasion to look to legislative history.") (citing *Burlington N. R.R. v. Okla. Tax Comm'n,* 481 U.S. 454, 461, 107 S. Ct. 1855, 95 L. Ed. 2d 404 (1987)).

The legislative history Defendant presents does not "clearly express" an intention to restrict or alter the ordinary meaning of the term "personally."[2] Even if the legislative

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[2] Defendant contends, for example, that the Court should adopt the meaning of the word personally proposed by Mr. James Finucane, who initially proposed the word in hearing on H.R. 7376. Defendant argues, "Mr. Finucane's intended purpose in proposing the legislative language of 'personally' included advocating an 'amnesty for immigration purposes' for those who had not 'actually

history *clearly* conflicted with the ordinary meaning of the term "personally," however, "'the mere fact that statutory provisions conflict with language in the legislative history is not an exceptional circumstance permitting a court to apply the legislative history rather than the statute.'" *Neosho,* 315 F.3d at 1033 (quoting *Erickson,* 856 F.2d at 1070). Further, the Eighth Circuit has clearly stated that the Court must "refuse to read into the statute what Congress has declined to include." *Id.* (quoting *Welsh v. Boy Scouts of Am.,* 993 F.2d 1267, 1270 (7th Cir. 1993)). Here, Congress declined to include a definition of the term personally and the legislative history does not clearly express an intent to adopt some alternative meaning for the word. Accordingly, the plain and ordinary meaning of that term must govern, that is, a person could not receive a visa under the RRA if that person "on or for [his] own part" advocated or assisted in persecution.

Defendant next argues that the present case is distinguishable from *Friedrich* because Friedrich voluntarily joined the Waffen SS, while Defendant was essentially involuntarily conscripted. Whether or not the Defendant's service in the Waffen SS was voluntary, however, is irrelevant to a determination of whether his visa was properly issued within the meaning of the RRA. The plain language of RRA section 14(a) does not contain a voluntariness requirement. In *Fedorenko,* the Supreme Court, addressing the assistance in persecution provision of the DPA, found: "Under traditional principles of statutory construction, the

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committed the crimes of intolerance,' while excluding those who had 'actually' done so." Def.'s Br. in Resistance to Summ. J. at 23. H.R. 7376 was never passed into law, and the opinion of one witness in a congressional hearing cannot forever bind or dictate what the intent of the entire Congress was when the RRA actually was passed into law.

deliberate omission of the word 'voluntary' from [the DPA] compels the conclusion that the statute made *all those* who assisted in the persecution of civilians ineligible for visas," not just those whose assistance in persecution was voluntary. *Fedorenko*, 449 U.S. at 512 ("The plain language of the [DPA] mandates precisely the literal interpretation . . . an individual's service as a concentration camp armed guard--whether voluntary or involuntary--[makes such person] ineligible for a visa."). The *Fedorenko* Court also noted that when Congress seeks to impose voluntariness exceptions into the law, it must do so expressly:

> That Congress was perfectly capable of adopting a "voluntariness" limitation where it felt that one was necessary is plain from comparing [the provisions of the DPA, one of] which excludes only those individuals who "*voluntarily* assisted the enemy forces . . . in their operations . . . ." Under traditional principles of statutory construction, the deliberate omission of the word "voluntary" from [the DPA provision under consideration] compels the conclusion that the statute made *all* those who assisted in the persecution of civilians ineligible for visas.

Fedorenko, 449 U.S. at 512. The mere fact that the present action arises under the RRA, rather than under the DPA, cannot alter the conclusion that if Congress had wanted to impose a voluntariness requirement in the RRA, it clearly could have done so. Congress did not, however, impose such a requirement. This Court is "not at liberty to imply a condition which is opposed to the explicit terms of the statute. . . . To [so] hold . . . is not to construe the [RRA] but to amend it." *Id.* (citing *Detroit Trust Co. v. The Thomas Barlum*, 293 U.S. 21, 38, 55 S. Ct. 31, 79 L. Ed. 176 (1934)).

Defendant next argues that there exists strong circumstantial evidence showing that Defendant's service was well known to immigration officials at the time his visa was granted. Defendant asserts that this distinguishes his case from Friedrich's case because Friedrich actively attempted to conceal his affiliation with German forces while the Defendant did not. Even assuming, however, that immigration and consular official were fully aware of Defendant's status as a member of the Waffen SS, and of his duties as a Death's Head guard, the fact remains that if Defendant "personally advocated or assisted in the persecution of any person or group of persons because of race, religion, or national origin," he had no legal right to a visa, regardless of what the issuing officials knew or did not know. This is so because the mistaken grant of a visa confers no rights upon its recipient. *See e.g., Aguirre-Moreno v. INS,* 89 F.3d 844, 1996 WL 344614, at *1 (9th Cir. 1996) ("A visa is not valid, however, if issued on the basis of mistake. . . . If the consular officer issued Aguirre-Moreno's visa by mistake, the visa, though issued properly procedurally, is still invalid."); *Lai Haw Wong v. INS,* 474 F.2d 739, 742 (9th Cir. 1973) (mistaken admission cannot constitute lawful admission). Moreover, the face of Defendant's visa indicates that it "does *not* entitle the bearer to enter the United States if, upon arrival at a port of entry of the United States, he is found to be inadmissible under the law." PI.'s App. Exh. 27 (emphasis in original). Defendant identifies no law that would legitimately lead the court to conclude that the Government must be bound by the mistakes of its agents in a matter so important as immigration, even when the error is not discovered until thirty years after its commission. On the contrary, the law provides that Government agents cannot act outside the scope of their authority, as such authority is defined by Congress. "Whatever the form in which the Government functions, anyone entering into an arrangement with the Government

takes the risk of having accurately ascertained that he who purports to act for the Government stays within the bounds of his authority. . . . And this is so even though, as here, the agent himself may have been unaware of the limitations upon his authority." *Federal Crop Ins. Corp. v. Merrill,* 332 U.S. 380, 384, 68 S. Ct. 1, 92 L. Ed. 10 (1947); *see also Walls v. Mississippi State Dep't of Pub. Welfare,* 730 F.2d 306, 324 (5th Cir. 1984) (finding the Government is not bound by mistakes of its agents when seeking to vindicate a public right). The Fifth Circuit has eloquently stated why Defendant's argument must fail: "It would be paradoxical if a person who was ineligible to receive a visa and should have been excluded from admission became lawfully admitted simply because, by error, he was not excluded." *In re Longstaff,* 716 F.2d 1439, 1441-42 (5th Cir. 1983).[3]

Defendant make numerous other arguments, and cites sundry purportedly disputed issues of material fact in his pleadings which the Court finds no reason to address in detail.[4] Such issues are superfluous to the narrow question

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[3] This same reasoning applies to Defendant's argument that he should not be denaturalized because numerous other concentration camp guards were admitted to the United States under circumstances where it was clear that the vice consuls knew of their service. The mere fact that other persons may have been unlawfully admitted to the United States does not diminish Defendant's own unlawful admission or make it any less actionable.

[4] Amongst other things, Defendant argues: 1) a heightened standards of review should be applied because the Government's pleadings allege that he was "complicit in [a] closed culture of murder;" 2) the Office of Special Investigations is limited to tracking "Nazi war criminals;" 3) the Government must make a showing of substantial federal benefit to be gained by deporting the

raised by the Government's Complaint, that is, whether Defendant personally advocated or assisted in the persecution of any person or group of persons because of their race, religion, or national origin. The wealth of case law on the issue under both the Holtzman Amendment and the DPA, as well as the Eighth Circuit Court of Appeals ruling in *Friedrich,* decided under the RRA, compel this Court to conclude that he did. *See e.g., Fedorenko,* 449 U.S. at 512 n.34 ("There can be no question that a guard who was issued a uniform and armed with a rifle and a pistol, who was paid a stipend and was regularly allowed to leave the concentration camp to visit a nearby village, and who admitted to shooting at escaping inmates on orders . . . assisted in the persecution of civilians."); *Negele v. Ashcroft,* 368 F.3d 981, 984 (8th Cir. 2004) ("We conclude that by impeding prisoners' escape through his presence as an armed SS Death's Head Battalion Guard, Negele was actively and personally involved in persecution. By guarding the perimeters of the camps with a trained guard dog to ensure prisoners did not escape from life-threatening conditions, Negele contributed to the persecution which occurred in these facilities. There is little doubt the prisoners within the facilities Negele patrolled with his dog . . . would have considered him as part of the Nazi machine which kept them at death's gate."); *Schmidt,* 923 F.2d at 1259 ("Service as an armed guard . . . ensured the systematic destruction of concentration camp inmates. . . . Thus, even if Schmidt personally did not participate in the brutal acts committed at Sachsenhausen, the fact of his armed, uniformed service is sufficient to establish that he assisted in persecution."); *United States v. Kairys,* 782 F.2d 1374, 1378

Defendant; and 4) the Government's failure "to produce relevant and important evidence . . . must raise the presumption that . . . the evidence would be unfavorable to the government."

(7th Cir. 1986) ("*Fedorenko* continues to stand for the proposition that service as an armed guard equals persecution."); *Schellong v. INS,* 805 F.2d 655, 661 (7th Cir. 1986) ("Nazi concentration camps were places of persecution; individuals who, armed with guns, held the prisoners captive and prodded them into forced labor with threats of death or capital punishment cannot deny that they aided the Nazis in their program of racial, political, and religious oppression."); *Wasylyk,* 162 F. Supp.2d at 93 ("Even accepting defendant's statement that neither he nor anyone else killed any Jews while he was there, it is obvious that the presence of armed, uniformed guards served to oppress the inmates as well as to deter any attempts to escape, resist or obtain help. Defendant's portrayal of himself as a slave laborer no different from the Jews does not mitigate the fact that as an armed, uniformed guard at a watchtower at the gate of a forced labor camp, he assisted in the Nazis' imprisonment and forced labor of Jewish inmates of the camp."); *United States v. Schiffer,* 831 F. Supp. 1166, 1198 (E.D. Pa. 1993) ("The evidence clearly and unequivocally established that defendant, as an armed Waffen-SS guard at Sachsenhausen, Trawniki, Majdanek and Hersbruck concentration camps, was an active participant in the persecution occurring at these camps in that he helped prevent inmates from escaping the grotesquely inhumane conditions there."); *Hutyrczyk,* 803 F. Supp. at 1010 ("Without individuals guarding the perimeter of the camp at night, ensuring that no Jew escaped, the cruel treatment would not have been able to continue. Defendant's work, then, does seem to have been assisting persecution."); *United States v. Osidach,* 513 F. Supp. 51, 90 (E.D. Pa. 1981) ("The mere presence of the watchful eye of the conqueror or his deputies, coupled with the often demonstrated presence of both the means and the inclination to persistently inflict various indignities . . . is the personification of mental persecution to anyone, let alone

innocent civilian[s] . . . reduced to various degrees of substandard mental and physical well-being.").

After a careful review of the record in this matter, Defendant's admitted conduct while a Death's Head guard at Sachsenhausen and Natzweiler is ample to find that he "personally advocated or assisted in the persecution" of persons because of their race, religion, or national origin. Defendant freely admits that both Sachsenhausen and Natzweiler were places of persecution founded upon race, religion, and national origin. Defendant also freely admits that, as a Death's Head guard at Nazi concentration camps, his duty was to prevent prisoners from escaping. He accomplished this by carrying either a machine gun or rifle and standing watch over the camp or over work-details outside the camp. Defendant admits personally walking only a few feet away from prisoners with a rifle, giving the prisoners orders, and telling them on at least one occasion that he would shoot them should they try to escape. Finally, Defendant admits to assisting in the search for an escaped prisoner, who ended up being shot. All of Defendant's activities and duties as a Death's Head Guard contributed and enabled the atmosphere of hate, suffering, and persecution faced by the concentration camp victims. Defendant personally undertook these actions and thus, personally assisted in persecution within the meaning of the RRA.

Chief Judge Richard S. Arnold succinctly and correctly recognized in *Turner,* that "summary judgments in favor of parties who have the burden of proof are rare, and rightly so." *Turner,* 149 F.3d at 824. Nonetheless, even before the adoption of the Federal Rules of Civil Procedure, the Supreme Court recognized that summary judgment merely "'prescribed the means of making an issue.'" Arthur R. Miller, *The Pretrial Rush to Judgment: Are the "Litigation*

Explosion," "Liability Crisis," and Efficiency Cliches Eroding Our Day in Court and Jury Trial Commitments?, 78 N.Y.U.L.R. 982, 1019 (June 2003) (quoting *Fidelity & Deposit Co. v. United States,* 187 U.S. 315, 320, 23 S. Ct. 120, 47 L. Ed. 194 (1902) (noting that only when the issue is made as prescribed does the right of trial by jury accrue)). The Court fully recognizes its duty to ensure that any doubt as to the facts of the present case must be resolved by denying summary judgment. This is particularly true where, as here, a grant of summary judgment necessarily results in the loss of a precious and irreplaceable interest--an individual's American citizenship. Despite the gravity of the consequences, however, the Court cannot ignore the Supreme Court's mandate to ensure "strict compliance with all the congressionally imposed prerequisites to the acquisition of citizenship." *Fedorenko,* 449 U.S. at 506. In this case, Defendant's admissions regarding his personal conduct as a Death's Head guard leave no room for factual dispute as to whether he personally advocated or assisted in persecution. As a matter of law, then, he was ineligible to receive a visa under the RRA. As such, Defendant was never lawfully admitted to the United States and his citizenship and certificate of naturalization were illegally procured under 8 U.S.C. § 1451(a).

III. CONCLUSION

For the reasons stated herein, the Defendant's Motion for Summary Judgment is DENIED. The Government's Motion for Summary Judgment is GRANTED. The Court Order dated October 30, 1961, admitting Defendant John Hansl to United States citizenship is hereby revoked. Certificate of Naturalization No. 8366435 is hereby canceled. Upon receipt of this Order, Defendant shall surrender Certificate of

Naturalization No. 8366435 and his United States passport, if he has one, to the Attorney General.

IT IS SO ORDERED

Dated this 8th day of April, 2005.

/s/
ROBERT W. PRATT
U.S. DISTRICT JUDGE

JUDGMENT IN A CIVIL CASE[.] DECISION BY COURT. This action came to before the Court. The issues have been considered and a decision has been rendered.

IT IS ORDERED AND ADJUDGED:

The Government's Motion for Summary Judgment is granted. The Court Order dated October 30, 1961, admitting Defendant John Hansl to United States citizenship is hereby revoked. Certificate of Naturalization No. 8366435 is hereby canceled. Defendant shall surrender his Certificate of Naturalization and his United States passport, if he has one, to the Attorney General.

Defendant's Motion for Summary Judgment is denied.

Date: April 8, 2005

APPENDIX D

IN THE UNITED STATES COURT OF APPEALS FOR THE EIGHTH CIRCUIT

No. 05-2540

[Filed December 19, 2005]

UNITED STATES OF AMERICA,	)
	)
Appellee,	)
	)
V.	)
	)
JOHN HANSL,	)
	)
Appellant.	)
	)

MOTION TO SUPPLEMENT THE RECORD

COMES NOW Appellant John Hansl, and hereby moves the Court for permission to supplement the record. Appellant notes that Appellee, the United States Government, has indicated that it will not oppose this motion. For the reasons set out below, Appellant reasonably believes there is good cause to grant such permission, and petitions the Court for same, stating as follows:

1. During discovery, Appellant requested information relating to applicants rejected under the Refugee

Relief Act of 1953 (RRA). The Government furnished redacted copies of summarized data on a number of applicants.

2. In their redacted condition, the documents were not sufficiently probative to support the Appellant's arguments, and were therefore not used as such.

3. On or about December 9, 2005, counsel for Appellant received newly-revised versions of the evidence from the Government, minus significant redaction, plus one document not previously provided to Appellant.

4. In their corrected condition, the documents provide highly material and probative evidence to support the Appellant's arguments that under the RRA, vice consuls considered such factors as: whether former concentration camp guards had committed atrocities (all applicants); the nature of the camp (Applicant G.G.); and that State Department Circular CA-4674 was considered as specifically not excluding a former concentration camp guard under INA § 212(a)(27) unless consul believed applicant had participated in atrocities (Applicant P.S.).

5. The Appellant reasonably believes that the evidence in its corrected condition should have been considered sufficiently probative to have influenced the decision of the District Court, had that Court had the opportunity to be presented with the evidence.

6. On December 13, 2005, counsel for Appellant conferred with the Government counsel by telephone, and was assured that no objection to this motion would be forthcoming.

WHEREFORE, in the interest of justice and for all reasons discussed above, Appellant John Hansl respectfully requests that the Court add the attached documents to the record and consider them in support of Appellant's briefs.

/s/
Lisa M. Mattsson
Benzoni Law Office, P.L.C.
2912 Beaver Avenue
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(515) 271-5730
ATTORNEY FOR
DEFENDANT/APPELLANT

A. A.
DPOB: 12/6/11 - Stolpce, Poland

REFUSAL:

Refused visa under 212 (a) (27) and 212 (a) (19)

WARTIME HISTORY:

Applicant found to have been mayor of district of Nieswiez from 1942 to 1944 - Obtained post by arresting Polish administration who were shot - was chief investigator of action against polish intelligencia, 70 shot - took brides for never given help to Jews.

APPLICATION HISTORY:

In previous and present applications, listed residence from 1940 to 1944 as technical worker in Lodz.

1955, admitted to mayorship

Denied responsibility for acts of violence

[REDACTED]

A. A.
DPOB : 12/6/11 - Stolpce, Poland

REFUSAL:

Refused visa under 212 (a) (27) and 212 (a) (19)

WARTIME HISTORY:

Applicant found to have been mayor of district of Nieswiez from 1942 to 1944 - obtained post by arresting Polish administration who were shot - was chief investigator of action against polish intelligencia, 70 shot - took brides for never given help to jews.

APPLICATION HISTORY:

In previous and present applications, listed residence from 1940 to 1944 as technical worker in Lodz.

1955, admitted to mayorship

Denied responsibility for acts of violence

Note: denied visa under 14(a) of RRA in 4/55.

Note: Section 212(a)(27) denial based on what defendant did, not what he would have done – but completed with section (a)(19) misrepresentations – Note: State (Firth) through (a)(27) dispositive and not sure of a (19).

G. G.
DPOB: 10/2/09 - Sekitsch, Yugoslavia

REFUSAL:

Refused 7/31/61 under 212 (a) (27)

WARTIME HISTORY:

a member of SS Death's Head battalion and a guard at Buchenwald.

- No specific evidence of atrocities

- Placed in numerous line-ups and never Id as committing atrocities.

COMMENTS:

"The Department believes, however, that it is likely he did participate in atrocities, given the nature of this particular camp, and that his victims may not have survived. The Department is further of the opinion that in order to have been selected for membership in the SS Totenkopf Division of the Army and to have been assigned to guard duty at the notorious Buchenwald Concentration Camp, rather than for military duty would indicate that Mr. G. was in complete accord with the aims of the National Socialist Workers Party." Thus ineligible under 212 (a) (27).

[REDACTED]

G. G.
DPOB: 10/2/09 - Sekitsch, Yugoslavia

REFUSAL:

Refused 7/31/61 under - 212 (a) (27)

WARTIME HISTORY :

a member of SS Death's Head battalion and a guard at Buchenwald.

- No specific evidence of atrocities

- Placed in numerous line-ups and never Id as committing atrocities.

COMMENTS:

Advisory Opinion, DOS: "The Department believes, however, that it is likely he did participate in atrocities, given the nature of this particular camp, and that his victims may not have survived. The Department is further of the opinion that in order to have been selected for membership in the SS Totenkopf Division of the Army and to have been assigned to guard duty at the notorious Buchenwald Concentration Camp, rather than for military duty would indicate that Mr. G. was in complete accord with the aims of the National Socialist Workers Party." Thus, ineligible under 212 (a) (27).

Note, that Totenkopfs found to be criminal in Nurnberg trial was significant.

[REDACTED]

Accidentally not produced.

G. K.
DPOB: 1/25/00 - Stanica, U.S.S.R.

REFUSAL:

Rejected: 7/24/50 under, section 13 of DP Act
Also in 1955 under (a) (27) - though final action form not present

WARTIME HISTORY:

Report revealed Subject was a member of the SS and had a long history of cruelty. Also, an informant for Gestapo in Warsaw. (Wife also a Gestapo informant)

- changes loyalty frequently and is suspected of murdering six people. "An established liar, an expert in mayhem."

- participated in suppression of Warsaw uprising.

APPLICATION HISTORY:

1950 - Section 13 - DP rejection
1952 - Soviet quota - No. 10790
1955 - RRA

COMMENTS: Note on investigation on report of 1955: "DP file speaks for itself. Refuse PL 03 (14) (a) & 212 (a) (27) ebj 10/10"

dated 9/29/55

Applied in 1955 "ebj" wrote that State should standby its Section (a) (27) refusal -- it appears that he is not refused only because of his SS membership under (a) (27).

[REDACTED]

J. K.
DPOB: 5/2/07 - Fulda, Germany

REFUSAL:

7/12/54 - 212(a) (27). Citing OMV 8, July 6, 1954

WARTIME HISTORY:

Member of Nazi party from 1937 to 1945, in Allgemeine SS from 1939 to 1940 and Waffen-SS from 1940 to 1945.

Note - from 1938 to 1940 worked with SS at Dachau – activity unclear.

- also with Gestapo in Czechoslavakia.

- was a member at SS Totenkopf

[REDACTED]

J. K.
DPOB: 5/2/07 - Fulda, Germany

REFUSAL:

7/12/54 - 212 (a) (27). Citing OMV 8, July 6, 1954

WARTIME HISTORY:

Member of Nazi party from 1937 to 1945, in Allgemeine SS from 1939 to 1940 and Waffen-SS from 1940 to 1945.

Note - from 1938 to 1940 worked with SS at Dachau – activity unclear.

- also with Gestapo in Czechoslavakia.

- Was a member at SS Totenkopf

COMMENTS:

Advisory Opinion: State concurred in (a) (27) applicability on 7/6/54 after receiving report of history with following comment: "The applicant has denied any participation in atrocities. However, it has been the experience of this Consulate that no applicant, including admitted concentration camp guards, has ever admitted committing an atrocity. In view of his falsification as regards his SS background, it is not believed that Mr. K.'s denial of involvement in atrocities can be taken at face-value" -- asked for (a) (27) ruling.

[REDACTED]

P. S.
DPOB : 3/24/04 - Czervenka, Yugoslavia

REFUSAL:

Refused 3/16/54 - Frankfurt based on dispatch #397 (3/16/54) "to enter United States, solely, principally or incidentally to engage in activities would be prejudicial to the public interest, or endanger the welfare, safety or security of "United States."

212 (a) (27) - from Sudell, American Consul

MILITARY HISTORY:

9/44 - 4/45 Waffen-SS Totenkopf: Morbeg, Austria and Dachau, Germany

- Guard at Dachau, was at subcamp of Alach.

- Note, subject admitted service

[REDACTED]

P. S.
DPOB: 3/24/04 - Czervenka, Yugoslavia

REFUSAL:

Refused 3/16/54 - Frankfurt based on dispatch #397 (3/16/54) "to enter United States, solely, principally or incidentally to engage in activities would be prejudicial to the public interest, or endanger the welfare, safety or security of United States."

212 (a) (27) - from Sudell, American Consul

MILITARY HISTORY:

9/44 - 4/45 Waffen-SS Totenkopf: Morbeg, Austria and Dachau, Germany

- Guard at Dachau, was at subcamp of Alach.

- Note, subject admitted service

COMMENTS:

4/14/54 from State ESM - OMV #609 cites case in Circular Instruction CA-4674 dated 3/2/54 States unless consular official believes subject participated in atrocities, mere membership in Totenkopf SS and duty at Dachau is not enough to exclude him under (a) (27) (unless general unrest would result from admission) "ESM"

Note: OMU #609 explicitly states status without more, i.e., evidence of personal participation in atrocities, is not enough.

[REDACTED]

APPENDIX E

Statutes

Refugee Relief Act of 1953, Pub. L. No. 203, 67 Stat. 400, as amended by 68 Stat. 1044 (1954) (RRA), §14(a) states: "No visa shall be issued under this Act to any person who personally advocated or assisted in the persecution of any person or group of persons because of race, religion, or national origin."

RRA §2(d) states: "'Administrator' means the administrator of the Bureau of Security and Consular Affairs established in the Department of State pursuant to subsection (b) of section 104 of the Immigration and Nationality Act."

RRA §4(a)(1) provides in relevant part: "Not to exceed fifty-five thousand visas to German expellees residing in the area of the German Federal Republic or in the western sectors of Berlin or in Austria. . ."

RRA § 15 states: "Except as otherwise expressly provided by this Act all of the provisions of the Immigration and Nationality Act (66 Stat. 163) shall be applicable under this Act."

Immigration and Nationality Act of 1952, Pub. L. No. 82-414, Ch. 477, 66 Stat. 163 (INA) §104(a) provides in relevant part: "The Secretary of State shall be charged with the administration and the enforcement of the provisions of this Act and all other immigration and nationality laws relating to (1) the powers, duties, and functions of diplomatic

and consular officers of the United States, except those powers, duties and functions conferred upon the consular officers relating to the granting or refusal of visas. . . He shall establish such regulations; prescribe such forms of reports, entries and other papers; issue such instructions; and perform such other acts as he deems necessary for carrying out such provisions."

INA § 104 (b) provides in relevant part: "[the administrator] shall be charged with any and all responsibility and authority in the administration of the Bureau and of this Act which are conferred on the Secretary of State as may be delegated to him by the Secretary of State or which may be prescribed by the Secretary of State."

INA § 212(a)(27) [excludes as ineligible to receive visas]: "Aliens who the consular officer or the Attorney General knows or has reason to believe seek to enter the United States solely, principally, or incidentally to engage in activities which would be prejudicial to the public interest, or endanger the welfare, safety or security of the United States."

The Displaced Persons Act of 1948, Pub. L. No. 80-774, Ch. 647, 64 Stat. 1009, as amended by Pub. L. No. 81-555, Ch. 262, 64 Stat. 219 (1950) (DPA) §13 provides: "No visas shall be issued under the provisions of this Act, as amended, to any person who is or has been a member of the Communist Party, or to any person who adheres to, advocates, or follows, or who has adhered to, advocated, or followed, the principles of any political or economic system or philosophy directed toward the destruction of free competitive enterprise and the revolutionary overthrow of representative governments, or to any person who is or has been a member of any organization which has been designated by the Attorney General of the United States as a Communist organization, or to any person

who is or has been a member of or participated in any movement which is or has been hostile to the United States or the form of government of the United States, or to any person who advocated or assisted in the persecution of any person because of race, religion, or national origin, or to any person who has voluntarily borne arms against the United States during World War II. Upon arrival at the port of entry in the United States, every person eighteen years of age or older authorized to be admitted under this Act, shall take and subscribe an oath or affirmation that he is not and never has been a member of any organization or movement named in this section, and shall be liable to prosecution for perjury if such oath or affirmation is willfully false. If any person not entitled to a visa under this section shall nevertheless gain admission to this country, in addition to the penalty above-mentioned, such person shall, irrespective of the date of his entry, be deported in the manner provided by sections 19 and 20 of the Immigration Act of February 5, 1917, as amended."

DPA Sec. 12. "(a) Notwithstanding the provisions of section 12 of the Act of May 26, 1924, as amended, until July 1, 1952, a number of immigration visas not to exceed fifty-four thousand seven hundred and forty-four may be issued to persons of German ethnic origin who were born in Czechoslovakia, Estonia, Hungary, Latvia, Lithuania, Poland, Rumania, Russia, or Yugoslavia, or areas under the control and domination of any such countries . . ."

(2)

No. 06-239

In the Supreme Court of the United States

JOHN HANSL,

Petitioner,

v.

THE UNITED STATES OF AMERICA,

Respondent.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Eighth Circuit

PETITION FOR REHEARING

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The petitioner herein respectfully moves this Court for an order (1) vacating its denial of the petition for writ of certiorari, entered on October 2, 2006, and (2) granting the petition. As grounds for this motion, petitioner states the following:

1. The Grant of Certiorari in *Lopez v. Gonzales* and *Toledo-Flores v. United States*

On October 3, 2006, following denial of certiorari in the instant case, this Court heard oral arguments in *Lopez v. Gonzales* and *Toledo-Flores v. United States*, Nos. 05-547 and 05-7664 respectively. The question presented in *Toledo-Flores v. United States* was, "Has the Fifth Circuit erred in holding – in opposition to the Second, Third, Sixth, and Ninth Circuits – that a state felony conviction for simple possession of a controlled substance is a 'drug trafficking crime' under 18 U.S.C. §924(c), and hence an 'aggravated felony' under 8 U.S.C. §1101(a)(43)(B), even though the same crime is a misdemeanor under federal law?" The question in *Lopez v. Gonzales* was substantially the same question.

While the instant case involves the statutory interpretation of the Refugee Relief Act of 1953 ("RRA") and how former concentration camp guards were handled under the RRA and the INA in 1955, whereas the *Lopez* and *Toledo-Flores* cases involve how state crime charges affect immigration status, many of the same fundamental considerations are involved regarding the issue of uniformity within immigration law. As pointed out in the *Lopez* brief,

> "Congress's exclusive power 'to establish a uniform Rule of Naturalization' has given rise to a well-settled policy that federal immigration and naturalization laws should be applied uniformly throughout the country.

> Congress itself has endorsed this policy, declaring: 'It is the sense of Congress that . . . the immigration laws of the United States should be enforced vigorously and uniformly." Immigration Reform and Control Act of 1986, Pub. L. No. 99-603 §115, 100 Stat. 3559, 3384 (1986). . .By its terms, the Constitution grants Congress authority to 'establish a uniform Rule.' U.S. Const. art. I, §8 does not grant Congress authority to establish a nonuniform rule." *Lopez* Brief, 34-35.

Congress had already established a permanent national immigration law, the INA, when it enacted a second post-war refugee emergency visa statute, the RRA, in 1953. The RRA incorporated the INA within RRA §15, and as noted below, its legislative history makes clear that Congress intended that the RRA be administered within the parameters of the INA. Any interpretation of the RRA that would have put it at odds with the INA would have been unconstitutional. This Court has always preferred interpretations that avoid serious constitutional issues. *Clark v. Martinez*, 543 U.S. 371, 380-81 (2005).

As noted by Acting Secretary of State Walter Bedell Smith: "This proposal [the RRA] is not directed toward changing [the Immigration and Nationality Act]. In fact the program it provides for would operate within the framework of the general existing legislation." C.A. App. 752. Acting Secretary of State Smith was also the same official who signed State Department Instruction CA-4674, later codified into regulations, which created the policy which made former Waffen SS who had belonged to organizations known to have committed atrocities eligible for visas, so long as the applicant had not "personally participated therein." C.A. App. 387.

State Department Instruction CA-4674 was issued under the INA. The withheld evidence established beyond doubt that it was the State Department policy from 1954 onward to apply CA-4674 to former concentration camp guards. App. 51a. The evidence further implicated that RRA-era applicants were considered under the same standard. Furthermore, seven consular officials made statements that to that effect. C.A. App. 58, 128, 1159, 1164, 1150, 1104, 1142 (statements made by former consular officials indicated that former concentration camp guards could have been granted visas under the RRA). This uniformity of treatment under immigration law is consistent with the constitutionality of congressional power to enact and regulate immigration law. Any other way of interpreting and applying the RRA would have resulted in non-uniform immigration law and policy, which would have been unconstitutional and invalid.

Consular officials who were responsible to administer both the INA and the RRA could not possibly have been expected to apply different standards to former concentration camp guards under the INA and the RRA, in violation of uniform immigration policy, nor were they expected to do so. "In guidance to RRA visa officers [State Department and Visa Office officials] Mssrs. L'Heureux and Smith noted that CA-4674 removed the rigidity that numbers of consular officials had perceived in Section 212(a)(27), (28), and (29) of the Immigration and Nationality Act and, by extension, Section 14 of the Refugee Relief Act . . . No longer could RRA visa officers automatically find a person ineligible to receive a visa solely because of membership in a proscribed organization." Blake Affidavit. C.A. App. 58.

This issue of uniformity within immigration law matters not only to RRA defendants, but matters because the interpretation of undefined terms within immigration statutes

is involve Where immigration statutes have ambiguous language that is capable of more than one interpretation, circuits are now split on whether to defer to the agency interpretation, or to apply dictionary meanings to the statutory language, and call it unambiguous. This creates uncertainty regarding the degree of discretion the immigration and Homeland Security agencies are to be afforded as they administer immigration laws containing undefined terms. Then writing for the Third Circuit, Justice Alito stated that within the asylum context (which the RRA foreshadowed), the undefined term "persecution" expressed unmistakable congressional intent to delegate interpretive authority: "We infer from Congress's use of this ambiguous term an intent to delegate interpretive authority to the agency, including the ability to decide, within a reasonable range, the contours of its meaning." *Chen v. Ashcroft,* 381 F.3d 221, 232 (3d Cir. 2004). Justice Alito further explained the rationale for bright-line agency rules: "Such rules, like the one adopted by the BIA here, represent pragmatic approaches that make it possible for an overburdened agency to do the work with which it is charged." *Id.* at 229.

The facts in *Chen* related to persecution in China relating to enforced birth control. However, Justice Alito alluded to the Holtzman Amendment legislative history when he explained why Congress refrained from defining "persecution:" "At a more general level, we note that some members of Congress have in the past actually considered--and rejected--the possibility of providing an explicit definition for "persecution" in connection with another portion of the INA. It was reasoned that: 'Persecution, however, has and will continue to take many forms and it is the intention of the committee in recommending this legislation to allow the maximum amount of flexibility possible in its administration. The inclusion of a necessarily limited and rigid definition

would be inconsistent with such an intent.'" *Id.* at 234 (citing the Holtzman Amendment legislative history, H.R. Rep. 95-1452, at 6-7 (1978), *reprinted in* 1978 U.S.C.C.A.N. 4700, 4705-06). This logic is also consonant with that of Senator Watkins, when discussing the difficulty of assessing persecution prior to the passage of the RRA, in a discussion that included the example of a refugee whose past history included service at three concentration camps. Also involved in the discussion was an expert on refugee screening, Dr. Roland Elliott, who had been involved in volunteer agency screening under the DPA:

> Senator Welker: How are we going to get over there and investigate where these refugees came from, their backgrounds, as to what they did, whether or not they were subversive, whether or not they took part in persecution behind the Iron Curtain? It seems to me that is one of our hardest problems. Would you agree with me, Doctor, on that?. . .
> Dr. Elliott: It is a very difficult problem, I certainly would say. My own feeling is that we need competent people to do the screening far more than we need precise definitions with regard to, well such things as criminality. What is criminality? It may be that the criminality that would be interpreted as being exclusionary would be the kind of criminality that would be part of a person's necessity to survive or escape. For example, we have a case [page cut off] Island being detained under the requirement of the DP law, where a man, because of early experience in Rumania, is excludable. But following that experience, he served in three Nazi concentration camps in Germany. So that what I am saying is that we need a certain amount of resiliency and personal judgment in this area as well as strict definitions.

> Senator Watkins: Well, it is almost impossible in dealing with human beings to adopt strict, rigid rules that will apply to every case, and render justice in each case. C.A. App. 781.2.

This congressional dialogue provides plausible rationale as to why the crucial exclusionary terms in RRA §14(a) were left undefined, leaving the precise contours to be defined by the State Department personnel responsible for its administration. How the State Department resolved the question of applying workable parameters was answered by the withheld evidence. That evidence tended to indicate that where former concentration camp guards were concerned, the State Department applied the concrete and measurable "bright-line agency rule," "personally participated in atrocities," in its administration of the ambiguous §14(a) clause, "personally advocated or assisted in persecution." App. 51a (example of how CA-4674 was applied to RRA-era former concentration camp guards, since mere membership was prohibited as a way to screen for visa eligibility). This reasonable way to apply uniform immigration policy across two statutes, the INA and the RRA, must be upheld when Congress left the crucial terms of the RRA undefined, thereby leaving it to the State Department to define the contours of the policy.

The Third Circuit's interpretation in *Chen* is sharply at odds with the interpretation of the Eighth Circuit, however, which when faced with the similarly undefined terms within the RRA, held: "We need not turn to either the immigration officials' testimony or legislative history to determine the meaning of 'personally assisted' because the language of section 14(a) of the RRA is unambiguous . . .' The plain meaning of a statute controls, if there is one, regardless of an agency's interpretation.'" App. 8a (*citing United States v.*

S.A., 129 F.3d 995, 998 (8th Cir. 1997); *Hennepin County Med. Ctr. v. Shalala*, 81 F.3d 743, 748 (8th Cir. 1996)). Justice Alito's interpretation is consistent with the body of law which has held that within immigration law, it is well established that this Court gives deference to executive agency interpretations. *INS v. Aguirre-Aguirre*, 526 U.S. 415, 424 (1999). Conversely, the Eighth Circuit relied on cases unrelated to immigration law to support its proposition that the agency's view need not be consulted when interpreting the law in that area.

The close identity of the fundamental issue regarding uniformity of application of immigration laws in this petition and the *Lopez* and *Toledo-Florez* granted petitions amply justifies reconsideration of the denial of certiorari here. This Court should clarify for public policy reasons that within immigration law, this Court gives deference to congressionally-delegated, reasonable agency interpretations of undefined, ambiguous statutory terms that are consistent with the intent of the statute, and that result in uniform immigration policy. Such clarification would be consistent with this Court's rationale in *Fedorenko v. United States*, as well.

2. The War On Terror Means There Will Likely Be An Increase In Cases Affecting Naturalized Citizens

The tenor of the times indicates a coming rise in the number of U.S. citizens affected by the War on Terror, and therefore it is highly likely that there will also be an increase in cases affecting naturalized citizens. *See Rumsfeld v. Padilla*, 542 U.S. 426 (2004) (habeas case affecting U.S. citizen designated an "enemy combatant" under Homeland Security laws). A serious concern for future cases is the burden of proof that the Government should be expected to

carry in denaturalizing a citizen. This Court should take this opportunity to clarify and provide guidance on this important point.

In the instant case, the defendant brought ample evidence tending to show that it was the practice of the agency at the time to grant visas to former concentration camp guards under both the INA and RRA, under certain conditions. The evidence withheld by the Government and belatedly produced during appellate proceedings validated the evidence and lower court arguments of the defendant. For its part, the Government simply brought evidence to show that the defendant had been a guard, which was never disputed, and brought evidence relating to the horrific medical experiments and other atrocities committed by the Nazis, thereby implicating the defendant by association, although never charging that the defendant had been involved in any of those atrocities. The burden of proof for summary judgment therefore cannot be said to have been fulfilled, regarding whether the defendant had "personally assisted" in persecution within the meaning of Congress and the policy of the State Department during 1955. Rather, the statute's meaning was assigned by the court, which failed to fully consider the defendant's evidence. App. 11a (court's order does not mention any consular testimony or State Department Instruction CA-4674, and simply refers to files of known admitted guards as *ultra vires* acts). Ultimately, the withheld evidence indicated that the standard applied by the State Department in 1954 was whether a former concentration camp guard had "personally participated" in atrocities before being ineligible for a visa. App. 51a (State Department advisory opinion cited as applying the standard of CA-4674 to a former concentration camp guard during 1954).

This Court has recognized that the burden of proof in denaturalization proceedings is largely identical to the proof beyond a reasonable doubt standard required in criminal proceedings. *See Klapprott v. United States*, 335 U.S. 601, 612 (1949) ("Furthermore, because of the grave consequences incident to denaturalization proceedings we have held that a burden rests on the Government to prove its charges in such cases by clear, unequivocal and convincing evidence which does not leave the issue in doubt. This burden is substantially identical with that required in criminal cases – proof beyond a reasonable doubt.").

As recently quoted, Judge Posner of the Seventh Circuit has said: "The only consistency that we can see in the government's treatment of the meaning of 'aggravated felony' is that the alien always loses." *Gonzales-Gomez v. Achim*, 441 F.3d 532,535 (7th Cir. 2006). The instant case presents a similar concern regarding the burden of proof as it affects denaturalization of former concentration camp guards under the RRA. If courts are willing to disregard exculpatory evidence, and uphold the grant of summary judgment to the Government in denaturalization proceedings where the Government not only brought no evidence to show that the defendant had actually met the standards of exclusion as they were in place at the time the visa was granted, but actually withheld exculpatory evidence to the contrary, we must then say that in denaturalization proceedings, "The naturalized citizen always loses."

Future denaturalization cases under anti-terrorism statutes and other legislation must be held to the standards of proper burden of proof that had always been in place before a naturalized citizen could be stripped of the most precious of rights and ejected from society. Where no fraud or misrepresentation existed, and where the policies in place at

the time the visa was granted allowed for the grant of the visa, the visa must be upheld as a legitimate act of the agency acting on behalf of Congress. Subsequent changes in political climate must never be allowed to undermine the judiciary's responsibility to uphold the law.

CONCLUSION

For the reasons set forth above, as well as those contained in the petition for a writ of certiorari, petitioner prays that this Court grant rehearing of the order of denial, vacate that order, grant the petition and review the judgment and opinion below.

Respectfully submitted,

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CERTIFICATE OF COUNSEL

As counsel for the petitioner, I hereby certify that this petition for rehearing is presented in good faith and not for delay and is restricted to the grounds specified in Rule 44.2.

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